(18,967.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 316.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, PLAINTIFF IN ERROR,

vs.

SOLON L. WILEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
v.
SOLON L. WILEY. } No. 12212.

Pleas before the honorable the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 16th day of September, A. D. 1902.

Present: Hon. J. J. Sullivan, chief justice, Hon. Silas A. Holcomb judge, Hon. S. J. Sedgwick, judge.
Attest: LEE HERDMAN, *Clerk.*

Be it remembered, that heretofore, on the 13th day of August A.D., 1901, there was filed in the office of the clerk of the said supreme court a certain petition in error in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,
vs.
SOLON L. WILEY, Defendant in Error. } Petition in Error.

The plaintiff complains of the defendant for that on the 2nd day of May, 1901, the defendant herein recovered a judgment against the plaintiff herein in the district court of Douglas county, that the defendant go hence without day and have and recover of and from this plaintiff his costs expended taxed at $— and
2 awarding execution therefor in an action pending in said court wherein the plaintiff herein was plaintiff and the defendant herein was defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment in this—

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to law.
4. The court erred in receiving in evidence the paper marked Exhibit "E" attached to the deposition of John W. Chamberlain offered by the defendant.
5. The court erred in overruling the motion made by the plaintiff to strike from the record the paper marked Exhibit "E" attached to the deposition of John W. Chamberlain.
6. The court erred in overruling the motion made by the plaintiff at the close of all of the testimony to direct the jury to return a verdict for the plaintiff and against the defendant for the full amount sued for.

7. The court erred in giving paragraph No. 2 of the instructions given by the court on its own motion.

8. The court erred in giving paragraph No. 3 of the instructions given by the court on its own motion.

9. The court erred in giving paragraph No. 4 of the instructions given by the court on its own motion.

10. The court erred in giving paragraph No. 5 of the instructions given by the court on its own motion.

11. The court erred in giving paragraph No. 6 of the instructions given by the court on its own motion.

3 12. The court erred in giving paragraph No. 7 of the instructions given by the court on its own motion.

13. The court erred in overruling the motion for new trial.

14. The court erred in rendering judgment in favor of the defendant and against the plaintiff.

15. The court erred in refusing to give instruction numbered 1 asked for by the plaintiff.

16. Plaintiff in error further alleges that the answer of the defendant filed in this action in the district court does not state facts sufficient to constitute a defense to plaintiff's petition.

17. The court failed and refused to give to the judgment sued upon the full faith and credit provided by section 1, article 4, of the Constitution of the United States and provided by section 905 of chapter 17 of the Revised Statutes of the United States.

The plaintiff therefore prays that said judgment may be reversed, and a new trial granted in said cause and for such other relief as justice may require.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
By CRANE, CRANE & ERWIN AND
J. J. BOUCHER, *Its Attorneys.*

Endorsed: No. 12212. In the supreme court of the State of Neb. National Exchange Bank, of Tiffin, Ohio, plaintiff in error, *vs.* Solon L. Wiley, defendant in error, Petition in error, Supreme court of Nebraska, Filed, August 13, 1901, Lee Herdman, clerk, Crane & Crane & J. J. Boucher, att'ys for def't.

4 And, on the same day, to-wit, on the 13th day of August, A. D., 1901, there was filed in the office of the clerk of said supreme court a certain transcript in words and figures following, to-wit:

Docket 69, number 161.

Pleas before the Honorable W. W. Slabaugh, one of the judges and the presiding judge of the district court of the fourth judicial district of the State of Nebraska, at a term thereof within and for the county of Douglas, begun and held at the city of Omaha, on the 4th day of February, A. D. 1901.

Be it remembered, that heretofore, to-wit: on the 22nd day of June, A. D. 1900, National Exchange Bank of Tiffin, Ohio, by Crane & Crane and J. J. Boucher, its attorneys, filed in the office of the clerk of said court, its amended petition against Solon L. Wiley, which said amended petition reads and is in the words and figures following, to-wit:

Amended Petition.

District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Amended Petition.

1. The plaintiff for cause of action alleges that plaintiff is a body corporate, duly organized under the laws of the United States, relating to organization and regulation of national banks and known as the national bank act. That its certificate of authority expired on the 17th day of March, 1885, but it is still lawfully exercising its franchise for the purpose of liquidating its affairs

2. Plaintiff further alleges that on the 31st day of July, 1899, the plaintiff recovered a judgment against Wiley Construction Company and S. L. Wiley, duly given by the court of common pleas in and for the county of Seneca, State of Ohio, for the sum of eleven thousand, four hundred nineteen and 68/100 dollars, ($11,419.68) and $6.50, costs of suit in an action then pending in said court in favor of the plaintiff and against said Wiley Construction Company and S. L. Wiley.

3. Plaintiff further alleges that the S. L. Wiley above referred to and Solon L Wiley defendant herein, are one and the same person.

4. Said judgment has not been paid nor any part thereof, and there is due from the defendant to the plaintiff therein the sum of $11,426.18, with interest from the 31st day of July, 1899.

Wherefore, plaintiff prays judgment against said defendant for the sum of $11,426.18, with interest thereon from July 31st, 1899, at 8 per cent. per annum and costs of suit.

CRANE & CRANE,
J. J. BOUCHER,
Att'ys for Plaintiff.

STATE OF NEBRASKA, *County of Douglas,* } *ss:*

H. S. Crane, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled action; that plaintiff is a corporation and non-resident of the State of Nebraska; that he

knows the contents of the foregoing petition; that the allegations therein contained are known to him to be true; that plaintiff is a corporation and non-resident of this State and that this verification is made by him for that reason.

H. S. CRANE.

Subscribed in my presence and sworn to before me, this 26th day of May, 1900.

[SEAL.] THOMAS D. CRANE,
Notary Public.

6 Afterward, on the 23rd day of August 1900, answer to amended petition was filed herein, which said answer is in the words and figures following, to-wit:

Answer to Amended Petition.

In the District Court in and for Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff, vs. SOLON L. WILEY, Defendant.	Answer to Amended Petition.

Now comes the defendant, and makes this his answer to the amended petition of the plaintiff on file herein, and for his defence thereto says:

1. That the said defendant denies that the said plaintiff is or was a corporation, and denies each and every allegation in the plaintiff's petition contained.

2. This defendant further answering says that on the 26th day of April, 1884, Wiley Construction Company, as principal, signed a promissory note for $10,000, payable to the order of the National Exchange bank, due October 18th, 1884, with eight per cent. interest after maturity that on the said 26th day of April, 1884, the name, S. L. Wiley, was signed to said note; that there never were any other signers to said note; that it was understood and agreed between all the parties interested in said note that if any liability at all should accrue to S. L. Wiley by reason of the premises that said liability should be, and should continue to be, secondary, and that of, to-wit: indorser; that no consideration ever accrued to said S. L. Wiley, for anything done in or about said note; that on, to-
7 wit: the 2nd day of March, 1885, the Tiffin national bank purchased received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein; nevertheless, this defendant is informed and believes, and upon information and belief states that said note forms the basis of the pretended judgment upon which the said plaintiff now brings this suit.

3. The defendant further says that if there ever was any cause of

action by reason of said note said cause of action arose on the said 18th day of October, 1884; and that said note and said cause of action was outlawed long before the commencement of this suit, or the said pretended suit in which the said plaintiff now claims to have recovered judgment; that the said suit in which the said plaintiff pretends to have recover- said judgment was not commenced prior to the 31st day of July, 1899.

4. The defendant further says that if any suit was ever brought upon said note in Seneca county, Ohio, or judgment entered as alleged in said petition, neither this defendant nor said S. L. Wiley, nor said Wiley Construction Company, ever had any notice or knowledge of said suit or of the pendency thereof, nor ever was served with summons or other process therein, nor ever entered their appearance, or the appearance of any one of them therein, nor was any one of them ever resident of, or found or summoned in Seneca county or in any other county in the State of Ohio, and if any judgment purports to have been rendered against this defendant, and in favor of said plaintiff, the said court in which it is claimed said judgment was entered was wholly without jurisdiction of this defendant in the premises, and was wholly without jurisdiction to render a
8 judgment in said suit and the said pretended judgment, if any such there was, is void, and of no effect, and is contrary to the Constitution of the United States and particularly to the seventh and to the fourteenth amendments, respectively, to said Constitution, and is contrary to the constitution of the State of Nebraska, and particularly to the sixth and to the thirteenth sections, respectively, of the first article of the constitution the State of Nebraska, and is contrary to the policy of the laws of the United States and of the State of Nebraska, respectively.

5. Defendant further says that the said signers of said note, and each of them, now has, and at all times has had, a good defense to said note in this, to-wit: that in, to-wit: the month of December, 1885, in the name of the National Exchange bank, as plaintiff, an action at law was commenced in the superior court of the county of Hartford, in the State of Connecticut, against The Wiley Construction Company, as defendant to recover from said defendant, upon said note, judgment for the amount thereof; that said Wiley Construction Company duly appeared in said suit and made answer to the petition of said plaintiff therein, and in and by its said answer denied each and every allegation of the plaintiff's petition or complaint contained; that at the October, 1886, term of said court the said cause duly came on for trial, and was duly tried, and upon consideration of the merits of said cause the said issues were found for the said defendant therein, and thereupon judgment was duly rendered in said cause for the said defendant at the costs of the said plaintiff, which said judgment was duly entered of record in said court, and made final, and stands unappealed from and unreversed.

6. This defendant further says, upon information and belief, that whatever judgment, if any, purports to have been rendered
9 in Seneca county, Ohio, upon said note, was against the said

signers thereof, jointly, and not against them severally, nor against them one as principal and the other as indorser or surety.

Wherefore the said plaintiff ought not now be permitted to maintain this suit.

7. In so far as S. L. Wiley is or was connected with or concerned in said note, said note was fully paid and satisfied more than twelve years ago, for that, on, to-wit: the 26th day of April, 1884, he deposited Ottumwa Hydraulic Power Company bonds of the par value of $13,000 as collateral security to said note; that the holder of said note duly agreed that if said Wiley would permit said bonds to be sold, and the proceeds of the sale thereof applied upon said note, and would further pay the costs of maintaining said suit in the State of Connecticut against said principal upon said note, that he should be released and discharged from any further liability upon said note; that pursuant to said agreement said Wiley permitted said bonds to be sold; that said bonds were so sold, and the proceeds of the said sale thereof were, or ought to have been, applied upon said note; that said Wiley never received any part of the proceeds of said sale; that said Wiley, further pursuant to said agreement, duly paid all the costs, including the plaintiff's attorney fee in bringing and maintaining said suit in the superior court for the county of Hartford, in the State of Connecticut, to recover from the principal upon said note the amount thereof; that the aforesaid agreement, and the said performance thereof all occurred more than twelve years before the commencement of this suit, and were received and treated by the holder of said note in full satis-
10 faction thereof as to said Wiley.

7. This defendant further says, upon information and belief, that said note had in it the following provision,—"and hereby authorizes N. L. Brewer, or any attorney at law in the United States or elsewhere, to appear before any court of record after the above obligation becomes due, and waive the issuing and service of process, and confess judgment against us or any or either of us, in favor of the holder of this instruction, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and writs of errors, and waive all right of appeal and stay of execution in our behalf, or in behalf of either of us."

Said defendant further says, upon information and belief, that the said plaintiff pretends that pursuant to said provision of said note, one John Bender entered an appearance for said Wiley Construction Company and S. L. Wiley, in the court of common pleas of Seneca county, Ohio, on the 31st day of July, 1899, and there and then confessed judgment in favor of said plaintiff on said note.

It is by reason of said pretended confession of judgment and not otherwise that the said plaintiff claims to have recovered a judgment against this defendant; nevertheless this defendant now is, and ever since the 30th day of July, 1899, has been, a non-resident of the State of Ohio, and is, and during all of said times has been a resident of the city of Omaha, Nebraska; that said Wiley Construction Company, during said time has been, and is, a resident of the

State of Connecticut, and a non-resident of the State of Ohio, and it would be inequitable, unjust and contrary to the Constitution of the United States and of the State of Nebraska, as afore-
11 said, to compel this defendant to go to the State of Ohio to defend himself against a suit there brought against him by the plaintiff; that no adequate remedy can be had in said court in Seneca county, Ohio, against said alleged judgment, if any such has been there made of record by plaintiff, for that the term at which said judgment is claimed to have been entered was adjourned on, to-wit: the 4th day of August, 1899, and before this defendant ever heard of said alleged suit or ever heard that it was pretended that a judgment had been entered in said court against him; that if any judgment was entered of record in said court in Seneca county, Ohio, the said John Bender also caused it therein and thereby to be entered of record in said court, and as a part of said judgment, that the defendants to said suit released and waived all exception, errors, and right of appeal in the premises; that said John Bender never had any right, power, or authority to appear for this defendant in said suit, or in said court, or to waive the issuance and service of process or otherwise, or in any manner whatsoever to represent or act for this defendant; that if said plaintiff is permitted to maintain this suit, or otherwise to proceed against this defendant on account of the matters and things so done or made of record in the said court of Seneca county, Ohio, this defendant will become involved in a multiplicity of suits, will be unduly and unjustly harrassed and annoyed, and put to great cost and expense, and will suffer great and irreparable injury, for which he can have no adequate remedy at law, and as to which he can only have adequate relief in a court of equity, where matters of this sort are properly cognizable.

To the end, therefore, that this defendant may have relief in a court of equity where matters of this sort are properly cognizable, the said defendant prays that the said plaintiff, its officers,
12 agents, servants and representatives, and each and every one of them, may be perpetually enjoined from prosecuting this or any other suit against this defendant on account of said pretended judgment, and on account of the said pretended promissory note, and may be enjoined from in any other way undertaking to collect or enforce said pretended judgment; that this defendant may recover his costs herein, and may have such other further relief in the premises as may be just and equitable.

JAMES H. McINTOSH,
Attorney for Defendant.

STATE OF NEBRASKA, }
County of Douglas, } ss:

James H. McIntosh, of lawful age, being first duly sworn deposes and says that he is attorney for the defendant in the above entitled action; that said defendant is now absent from Douglas county, and from the State of Nebraska; that he knows the contents of the foregoing answer and believes the facts therein stated are true.

JAMES H. McINTOSH.

Subscribed in my presence and sworn to before me, this 23rd day of August, 1900.

JOHN WILSON BATTIN,
Notary Public.

Afterward, on the 12th day of September, 1900, a reply was filed herein, which said reply is in the words and figures following, to wit:

Reply.

In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF Tiffin, Ohio, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Reply to Answer to Amended Petition.

13 Comes now the plaintiff above named and for reply to answer to amended petition of the defendant, denies each and every allegation therein contained, save as alleged in plaintiff's petition or hereinafter admitted.

2. For further reply plaintiff alleges that on the 26th day of April, 1884, in the city of Tiffin, county of Seneca, State of Ohio, the above named defendant made and executed and delivered to the plaintiff his promissory note, in the words and figures following:

$10,000.00. TIFFIN, OHIO, *Apr.* 26, 1884.

October 1st, 1884, after date, for value received, we jointly and severally promise to pay to the National Exchange Bank, or order, at its office in Tiffin, Ohio, ten thousand dollars, with 8 per cent. interest, after maturity. And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, in favor of the holder of this instrument for the amount then appearing due together with costs of suit, and thereupon to release all errors, and writes of errors, and waive all right, to appeal, and stay of execution, in our behalf or in behalf of either of us.

WILEY CONSTRUCTION COMPANY. [SEAL.]
S. L. WILEY, *Pres.* [SEAL.]
S. L. WILEY. [SEAL.]

P. O. Greenfield, Mass. Due Oct. 1st.

Said note is indorsed on back as follows:

"45170 May 9th, 1887, paid on the within $6311.75."

That the judgment sued upon in this action was rendered against the defendant herein in favor of the plaintiff to recover the balance due upon said note in an action then pending against said
14 defendant by the plaintiff in the court of common pleas, in and

for the county of Seneca, State of Ohio, that in pursuance of the warrant of attorney contained in and made a part of said note, one John Bender, an attorney at law, duly admitted to practice in the several courts of record of the State of Ohio, appeared in said court for and on behalf of said defendant, Solon L. Wiley, on the 31st day of July, 1899, and entered the appearance of said defendant and waived the issuing and service of process in said action and confessed a judgment in favor of said plaintiff against said defendant on said note for the sum of $11,419.68, being the amount due for principal and interest on said note and also for costs of suit taxed and to be taxed in the sum of $6.50, and that thereupon and on the same day, to-wit: July 31st, 1899, said court rendered judgment in favor of this plaintiff against said defendant in said sum of $11,419.68 and costs of suit, taxed at $6.50.

That under and by virtue of the laws of the State of Ohio, in full force and effect on said 31st day of July, 1899, the several courts of said State of Ohio, were authorized to and had full power and jurisdiction to render judgment upon the warrant of attorney contained in said note.

That, thereby and by reason of the premises aforesaid, it was unnecessary that said defendant have any notice or knowledge of said suit or of the pendency thereof, or that summons or other process should issue from said court or be served upon said defendant, or that said defendant should personally enter his appearance in said action.

Wherefore and whereby, said court had jurisdiction of said defendant and had jurisdiction to render judgment against said defendant, as aforesaid, and said judgment is now and at all times since the 31st day of July was, a valid and subsisting judgment against defendant.

15

CRANE & CRANE,
J. J. BOUCHER,
Att'y- for Plaintiff.

STATE OF NEBRASKA, } ss:
County of Douglas, }

Herbert S. Crane, being first duly sworn, says, that he is one of the attorneys for plaintiff in the above entitled action. That plaintiff is a non-resident corporation. That he knows the contents of the foregoing reply and that the allegation- therein contained are true, as he verily believes.

HERBERT S. CRANE.

Subscribed in my presence and sworn to before me, this 4th day of September, 1900.

[SEAL.]

J. N. HASKELL,
Notary Public.

Afterward, at the February term of said court, and on the 25th day of February, 1901, a trial was had herein as follows, to wit:

Trial.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
SOLON L. WILEY, Defendant. } 69–161.

Now come the parties hereto in person and by counsel; also come the following persons, as jurors, to wit: Samuel Bell, Geo. Blake, C. W. Brader, Elmer Baldwin, John H. Barnes, T. F. Derr, A. Dewey, W. A. Boggs, J. C. Christy, Wm. Bell, Wm. Bloomquist, William Everett, who were duly impaneled and sworn according to law.

And the said jury now having heard the testimony adduced in part, the further hearing of this case is hereby continued until Tuesday, February 26th, A. D. 1901.

16 Afterward, at the term of court aforesaid, and on the 26th day of February, 1901, said trial was continued herein, as follows, to-wit:

Trial Continued.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
SOLON L. WILEY, Defendant. } 69–161.

Now on this day come the parties hereto in person and by counsel; also come the jury heretofore duly impaneled and sworn and this cause proceeds.

And the said jury now having heard the evidence adduced in part, the further hearing of this cause was continued until February 27th, A. D., 1901.

Afterward, at the February term of said court, and on the 27th day of February, 1901, said trial was continued and verdict rendered herein, as follows, to-wit:

Trial Continued—Verdict.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
SOLON L. WILEY, Defendant. } 69–161.

Now comes the parties hereto in person and by counsel; also come the jury heretofore duly impaneled and sworn and this cause proceeds.

Afterward, on the 27th day of February, 1901, charge of the court was filed herein, which said charge of the court is in
17 the words and figures following, to-wit:

Charge of the Court.

In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, vs. SOLON L. WILEY, Defendant. } Doc. 69, No. 161. Charge of the Court.

GENTLEMEN OF THE JURY: This is an action in which the plaintiff sues the defendant to recover the sum of $11,426.68, with interest thereon from July 31st, 1899.

The plaintiff alleges in substance in its amended petition that on July 31st, 1899, it recovered a judgment against the Wiley Construction Company and S. L. Wiley, in the court of common pleas, in Seneca county, Ohio, for the sum of $11,419.68 and $6.50 costs.

That the S. L. Wiley therein named is the Solon L. Wiley defendant herein. That no part of said judgment has been paid and there is due the amount above named with interest.

To the amended petition of plaintiff the defendant Wiley files an answer in which in substance he alleges as follows:

He denies each and every allegation in the petition of pl'ff.

The defendant further answering in substance says that on April 26th, 1884, the Wiley Construction Company as principal and the defendant as surety, signed the promissory note for ten thousand dollars, payable to the order of the National Exchange bank, dated October 18th, 1884, with eight per cent. interest after maturity.

That on the 2nd day of March, 1885, the Tiffin national
18 bank purchased and received and became the holder of said note and since has been and still is the holder thereof, and the said plaintiff has never been the holder thereof or in any way interested therein.

Defendant further alleges that if any judgment purports to have been rendered against the defendant in Seneca county, Ohio, and in favor of said plaintiff, the said court in which it is claimed the judgment was rendered was wholly without jurisdiction of this defendant, in the premises and wholly without jurisdiction to render a judgment in said suit, and the said pretended judgment is void.

And further the defendant alleges in substance upon information and belief that said note had in it the following provisions.

"And further authorizes N. L. Brewer or any attorney at law in the United States or elsewhere to appear before any court of record, after the above obligation becomes due and confess judgment against us, or either of us in favor of the holder of this instrument &c."

That the said plaintiff pretends that pursuant to said provision, one John Bender, entered an appearance for said S. L. Wiley, in the court of common pleas in Seneca county, July 31st, 1899, and confessed judgment in favor of said plaintiff on said note.

That said John Bender never had any right or authority to appear for this defendant in said suit.

To defendant's answer plaintiff files a reply in which it denies the allegations in the answer, except as alleged in plaintiff's petition or in the reply admitted.

The plaintiff sets out the note sued upon, and the warrant
19 of attorney contained in said note, in the county of Seneca, Ohio, and alleges that in pursuance of said warrant of attorney, one John Bender, an attorney at law, appeared in said court on behalf of defendant, July 31st, 1899, and confessed judgment in favor of plaintiff for $11,419.68 and costs, $6.50, and that on said day judgment was rendered in favor of plaintiff and against defendant for said amount, and that said judgment is now valid and subsisting.

II.

You are instructed that the burden of proof is upon the plaintiff, in this case to establish by a preponderance of the *of the* evidence the material allegations in this petition, which are denied by the defendant.

Likewise the burden of proof is upon the defendant to establish in this case by a preponderance of the evidence the material allegations in the answer which are denied by the reply of the plaintiff.

III.

But you are instructed that under the law and the evidence in this case as it now stands, there is but one question for you to determine from the evidence, that is, was the plaintiff in the action in the court of common pleas of Seneca county, in which court judgment was rendered by confession for plaintiff July 31st, 1899, the holder of the note therein sued upon, and you have nothing whatever to do with any other question or argument on any other question. All other questions as to payment &c., have been settled, so far as you are concerned, by the binding judgment of the Ohio court, and the burden of proving that the plaintiff in said suit was not the holder of said note is upon the defendant herein.

IV.

20 You are instructed that as a matter of law in this case, it is presumed that the court of common pleas in Ohio acted regularly, and that the plaintiff in the action therein brought was the holder of the note therein sued upon and that said court had jurisdiction to render the judgment therein made and herein sued upon, and such presumption continues throughout this case until such time as it shall be overcome by a preponderance of the evidence that such were not the facts and the burden of showing by a preponderance of the evidence that such presumption were not true is upon the defendant in this case as above instructed.

V.

If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca county, Ohio, when and wherein the judgment by confession was entered upon said note, was the holder of said note then you should find for the plaintiff and assess its damages in the amount sued for, to-wit: $11,419.68, with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th, 1901, or the first day of this term of court, and add to this sum $6.50, the costs in the Ohio court, giving total in your verdict.

But, if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally.

VI.

By the term holder, as applied to the warrant of attorney as affecting the jurisdiction of the Ohio court to render judgment in favor of the holder of the note therein sued on, is meant "the owner thereof," "one who in good faith acquired the same for a valuable consideration."

VII.

By a preponderance of the evidence is meant, not the
21 greater number of witnesses, but the greater weight of the evidence, as viewed by you after a careful consideration of all the evidence *consideration of all the evidence* introduced in the case.

VIII.

You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony.

W. W. SLABAUGH, *Judge.*

Afterward, on the 27th day of February, 1901, instruction requested by plaintiff and refused was filed herein, which said instruction is in the words and figures following, to-wit:

Instruction Requested by Plaintiff—Refused.

District Court, Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, v. SOLON L. WILEY, Def't. } Instruction Asked by Plaintiff.

The jury is further instructed that in this case, the question of collateral security is not in issue, that the defendant makes no claim in the pleadings that the collateral security was not sold for its full value and the proceeds of the sale applied upon the note for

$10,000.00, so that the jury must conclusively presume, that the defendant was credited with the full value of the bonds put up by the defendant as collateral security.

(Refused: W. W. SLABAUGH, *Judge.*)

Afterward, on the 27th day of February, 1901, exceptions by plaintiff were filed herein, which said exceptions are in the words and figures, following, to-wit:

Exceptions to Instructions by Plaintiff.

22 In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Doc. —, No. —. Exceptions to Instructions by Plaintiff.

The plaintiff excepts to instruction No. 1, given by the court on its own motion.

The plaintiff excepts to instruction No. 2, given by the court on its own motion.

The plaintiff excepts to instruction No. 3, given by the court on its own motion.

The plaintiff excepts to instruction No. 4, given by the court on its own motion.

The plaintiff excepts to instruction No. 5, given by the court on its own motion.

The plaintiff excepts to instruction No. 6, given by the court on its own motion.

The plaintiff excepts to instruction No. 7, given by the court on its own motion.

The plaintiff excepts to instruction No. 8, given by the court on its own motion.

The plaintiff excepts to the refusal of the court to give instruction No. 1, asked by plaintiff.

The above exceptions duly taken and allowed.

W. W. SLABAUGH, *Judge.*

CRANE & CRANE,
J. J. BOUCHER,
Attorneys for Plaintiff.

And the said jury now having heard the evidence adduced, the argument of counsel and the charge of the court, retire in
23 charge of a sworn officer of the court to deliberate upon their verdict.

And now on this said 27th day of February, A. D., 1901, the said jury return into court, with their verdict in writing and say:

STATE OF NEBRASKA:

In District Court for Douglas County.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
SOLON L. WILEY, Defendant. } Verdict.

We, the jury duly impanneled and sworn to try the issue joined between the said parties, do find for the said defendant.

WM. H. BELL, *Foreman.*

Whereupon it is ordered that the said jury be and they hereby are discharged from further consideration of this case.

Afterward, on the 1st day of March, 1901, motion for a new trial was filed herein, which said motion is in the words and figures following, to-wit:

Motion for a New Trial.

In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff,
vs.
SOLON L. WILEY, Defendant. } Motion for a New Trial.

The plaintiff moves the court for an order setting aside and vacating the verdict of the jury heretofore rendered and granting a new trial of this cause for the following reasons:

1. The verdict is not sustained by sufficient evidence.
2. The verdict is contrary to the evidence.

24 3. The verdict is contrary to law.

4. The verdict is contrary to the instructions of the court.
5. Errors of law occurring at the trial duly excepted to.
6. The court erred in admitting in evidence the paper marked Exhibit "E" attached to the deposition of John W. Chamberlin, taken on behalf of the defendant and received on behalf of the defendant.
7. The court erred in overruling plaintiff's motion to withdraw said paper marked Exhibit "E" from the jury.
8. The court erred in overruling plaintiff's motion made at the close of all the testimony in the case to direct the jury to return a verdict in favor of the plaintiff.
9. The court erred in giving instruction No. 1, given by the court on its own motion.
10. The court erred in giving instruction No. 2, given by the court on its own motion.

11. The court erred in giving instruction No. 3, given by the court on its own motion.
12. The court erred in giving instruction No. 4, given by the court on its own motion.
13. The court erred in giving instruction No. 5, given by the court on its own motion.
14. The court erred in giving instruction No. 6, given by the court on its own motion.
15. The court erred in giving instruction No. 7, given by the court on its own motion.
16. The court erred in giving instruction No. 8, given by the court on its — motion.
17. The court erred in refusing to give instruction No. 1, asked for by the plaintiff.

25 NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
By CRANE & CRANE AND
J. J. BOUCHER, *Its Att'ys.*

Afterward, at the February term of said court, and on the 2nd day of May, 1901, order overruling motion for a new trial-judgment on verdict was entered herein, as follows, to-wit:

Order Overruling Motion for a New Trial-judgment on Verdict.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } 69–161. Judgment.

This cause came on to be heard upon the motion of the said plaintiff for a new trial of this action, and upon consideration thereof the court being well advised in the premises, it is ordered that the said motion be and it hereby is overruled, to which ruling of the court the said plaintiff duly excepts.

Whereupon on consideration of the verdict of the jury heretofore returned in this case, in favor of the said defendant and against the said plaintiff, it is considered, ordered and adjudged by the court that the said defendant go hence without day and have and recover of and from the said plaintiff, his costs herein expended, taxed at $—, for which execution is hereby awarded.

To all of which the said plaintiff duly excepts, and is allowed forty (40) days from the rising of the court in which to prepare and serve its bill of exceptions herein.

Afterward, at the February term of said court, and on the
26 4th day of May, 1901, order adjourning the February, A. D., 1901 term of court was entered herein, as follows, to-wit:

Order Adjourning the February, A. D. 1901, Term of Court.

In the Matter of the Adjournment of the February, A. D. 1901, Term of said Court.

Adjournment.

It is ordered that the February, A. D. 1901, term of this court stand adjourned at the close of business on May 4th, A. D. 1901.

It is further ordered that the causes not disposed of at the time of the adjournment, stand continued until the next ensuing term of this court.

This separate session of this district court, for the term of February, A. D., 1901, was begun on Monday, the 4th day of February, A. D., 1901, and continued from day to day and from time to time by regular adjournment this 4th day of May, A. D., 1901, and is now adjourned without day.

WM. W. KEYSOR,
W. W. SLABAUGH,
LEE S. ESTELLE,
J. FAWCETT,
B. S. BAKER,
CHARLES T. DICKINSON,
IRVING F. BAXTER,
Judges.

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank A. Broadwell, clerk of the district court, in and for Douglas county, Nebraska, do hereby certify that the foregoing is a full and true transcript of the proceedings had in the cause in
27 the district court, containing the amended petition, answer to amended petition, reply, trial, trial continued, trial continued, verdict, charge of the court, instruction requested by plaintiff refused, exceptions to instructions by plaintiff, motion for a new trial, order overruling motion for a new trial, judgment on verdict, and order adjourning the February, A. D., 1901 term of court, in the case of National Exchange Bank of Tiffin, Ohio, against Solon L. Wiley, appearing of record in said court.

I do further certify that the bill of exceptions hereto attached and made a part of this transcript, is the original bill of exceptions filed in the office of the clerk of said court, in the above entitled action.

Witness my signature, and the seal of said court, at the city of Omaha, this 17th day of May, A. D., 1901.

FRANK A. BROADWELL, *Clerk,*
[SEAL.] By A. STEERE, JR., *Deputy.*

J. J. Boucher, Esq., attorney for plaintiff,
has paid..... $8.75
Add 75 binding..... .75

$9.50 for this transcript.

Endorsed: 12212. Nat. Exchange Bank of Tiffin, Ohio, *v.* Solon L. Wiley, Transcript. Supreme court of Nebraska, Filed, Aug. 13, 1901, Lee Herdman, clerk.

3—316

And, on the same day, to-wit, on the 13th day of August, A. D., 1901, there was filed in the office of the clerk of said supreme court a certain bill of exceptions in words and figures, following, to-wit:

28–30 In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Doc. 69, No. 161.

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	Direct.	Corss.	Re-call.
J. M. Naylor	11–60	23–84	
J. W. Chamberlain	144	166	266
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J. W. Schaufelberger	226		
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Exhibit 1	499		

Filed Jul- 11 1901
FRANK A. BROADWELL, *Clerk.*

Entered.

In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, O., Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Doc. 69, No. 161.

Be it remembered that on the trial of the above entitled cause at the February 1901 term of the district court within and for Douglas county, Nebraska, the following proceedings were had:

* * * * * * *

31 In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Pl'ff, *vs.* SOLON L. WILEY, Defendant. } Doc. 69, No. 161.

The within is all the evidence offered or given upon the trial of the cause entitled The National Exchange Bank of Tiffin Ohio, plaintiff *vs.* Solon L. Wiley, defendant, doc. 69, No. 161, contains all objections made and exceptions taken at such trial and upon the

application of the said plaintiff this bill of exceptions is
32 allowed by me and ordered to be made a part of the record in this case.

W. W. SLABAUGH,
Judge of the District Court of the 4th Judicial District for Douglas County, Nebraska.

July 11" 1901.

Filed Jul- 11, 1901.
FRANK A. BROADWELL, *Clerk.*

Entered.
Form 2034.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank A. Broadwell, clerk of the district court, fourth judicial district of the State of Nebraska, in and for said county, do hereby certify that this is the original bill of exceptions filed in my office in the cause in said court, wherein Nat. Exc. B'k of Tiffin, O. is plaintiff and Solon L. Wiley defendant.

Witness my signature and official seal this 2nd day of August, 1901.

FRANK A. BROADWELL, *Clerk,*
[SEAL.] By A. STEERE, JR., *Deputy.*

It is stipulated by and between the plaintiff and the defendant that Solon L. Wiley, defendant herein, and S. L. Wiley, are one and the same persons as is alleged in paragraph 3 of plaintiff's petition.

The plaintiff offers in evidence a paper marked Exhibit 1, same being a transcript of the judgment of the court of common pleas of Seneca county, State of Ohio, rendered on the 31st day of July, 1899, in an action therein pending wherein The National Exchange Bank of Tiffin, Ohio, was plaintiff and The Wiley Construction Co. and S. L. Wiley are defendants. The said transcript consisting of a copy of the petition in said case, a copy of the answer in said case
33 by John Bender, attorney for defendants with an exemplification of the record in said case as appearing by the said records of said court together with the certificate by I. N. Rex, clerk of said court, and the certificate of C. W. Coffelburg, judge of said court to the identity of the signature of the clerk of said court, and the certificate again of the clerk of said court to the signature of the judge of said court.

The defendant objects to the introduction of Exhibit 1, for the several reasons following, to-wit:

1st. The corporate capacity of the plaintiff has not been shown and no foundation has been laid.

2nd. The note that forms the basis of the plaintiff's alleged judgment authorizes the confession of judgment in favor of the holder of

the instrument. The petition upon which the judgment is based purports to be a petition by the payee of the note. The payee of the note is the National Exchange bank. The National Exchange bank of Tiffin, Ohio, is neither payee of the note, nor the holder; therefore, the attorney had no authority to confess judgment in favor of the plaintiff in this suit, and the court was without jurisdiction in the premises.

3rd. The transcript tendered on its face shows that the court pretending to render the judgment was without jurisdiction of the defendant.

4th. The pleadings tendered as a part of Exhibit 1, show on their face, that at the time of the filing of the petition in Ohio the note therein described was outlawed; therefore, the warrant of attorney was revoked by the lapse of time.

5th. The warrant of attorney purporting to be attached to the petition forming a part of Exhibit 1, does not pretend to authorize the confession of judgment except for what appears to be
34 due. Nothing appears to be due upon the note because of the lapse of time; therefore, the court was without jurisdiction.

6th. The power of attorney purporting to be attached to the petition that forms part of Exhibit 1, shows upon its face that it was outlawed and that on account of the lapse of time the pretended attorney was without authority to give the court jurisdiction.

7th. Exhibit 1 shows upon its face that the warrant of attorney was not produced at the time of the confession.

8th. Exhibit 1 shows upon its face that at the time the judgment pretends to have been confessed, the original warrant of attorney was not produced, and that there was no evidence, or finding that the copy attached to the petition was a copy of the original. Therefore, the court was without jurisdiction to render a judgment.

9th. Exhibit 1 shows that neither the original warrant of attorney, nor anything shown to be a copy of the original was filed with the clerk; hence, the judgment was void.

10th. The pretended judgment sought to be exhibited by Exhibit 1, does not purport to have been based on a warrant of attorney, the execution of which was proven, and shows upon its face it was based upon the proof of the genuineness of the signature to the warrant attached to the petition. The original does not purport to be attached to the petition. The petition merely purports to have attached to it a copy of the warrant; hence, the judgment was void.

11th. Exhibit 1 is not responsive to the pleadings. The petition alleges judgment against Wiley. Exhibit 1, purports to show a joint judgment against the Wiley Construction Co. and S. L. Wiley. Such a judgment cannot be made the basis of a separate action against one of the named debtors.

Adjourned until tomorrow at 9:30 a. m.

35 & 36 OMAHA, NEBR., *Feb.* 26, 1901.

The taking of testimony is resumed pursuant to adjournment, the same persons appearing on either side.

The objections to Exhibit 1 are overruled.

The defendant excepts to the overruling of each of said objections.

A copy of Exhibit 1 is hereto attached marked Exhibit 1.

Same was received in evidence and read to the jury.

The plaintiff offers in evidence the deposition of J. M. Naylor.

* * * * * * *

37 The plaintiff offers in evidence the deposition of J. W Chamberlain.

* * * * * * *

38 Q. I refer to the note given April 26, 1884, for $10,000; you may state whether or not there was such a note?

Objected to for the reason that the question assumed that such a note was given, and the best evidence has not been produced, sustained, plaintiff excepts.

The plaintiff offers to read the answer in evidence, to wit: "There was."

The plaintiff offers in evidence Exhibit A, attached to the deposition of the witness, and referred to by the witness.

The offer is withdrawn.

Q. Who is the owner of that note, or the judgment based upon it at this time.

Objected to as calling for a conclusion of the witness, and not the best evidence, overruled, defendant excepts.

Q. You may state whether or not the national bank has ever parted with that note, or the judgment taken on the note?

Objection to as calling for a conclusion of the witness, overruled, defendant excepts.

Q. Who is entitled to the proceeds of that note, or the judgment taken upon it?

Objected to as calling for a conclusion of the witness, sustained, plaintiff excepts.

The plaintiff offers to read the answer in evidence, offer refused, plaintiff excepts.

Q. Mr. Chamberlain, I will ask you to look at the petition in the case of The National Exchange Bank of Tiffin, Ohio, *vs.* The Wiley, Construction Co., and S. L. Wiley, being case No. 11278 in the court of common pleas of Seneca county, Ohio, and ask you whether the note mentioned in that petition and what purports to be a
39 copy of it attached to the petition, is the same note that you have been testifying about and which you here exhibit to the stenographer?

Objected to for the reason that no foundation has been laid and for the further reason that it is immaterial. The objection is withdrawn.

Mr. McIntosh: I will withdraw my objection to the question about "who is entitled to the proceeds of the note or the judgment taken upon it" and allow the answer to be read.

The answer is read by the plaintiff.

Q. Uh huh; I will ask you if you have any record of the meeting of the directors or stockholders of the National Exchange Bank of Tiffin, Ohio, for 1899?

Objected to as immaterial, overruled, defendant excepts.

Q. Uh huh; now, you may state if you gave the Wiley note to Lutes & Lutes county attorney at the time it is claimed they put it in judgment?

A. I think I handed it to them myself by the direction of the directors of the Exchange bank.

The defendant moves to strike out that part of the answer of the witness commencing with "by the direction of the directors, etc.," as not responsive, sustained, plaintiff excepts.

Redirect examination.

By Mr. Boucher:

Q. Did the Tiffin national bank ever have any interest in this note in any way whatever?

Objected to as not indirect examination also for the reason that the matter has been gone into, sustained, plaintiff excepts.

The plaintiff offers to read the answer to the question to-wit: "No sir;" the offer is refused, plaintiff excepts.

* * * * * * *

40 & 41 Plaintiff offers in evidence the deposition of John McCauley.

* * * * * * *

42 The plaintiff offers in evidence the deposition of J. W. Schaufelberger.

* * * * * * *

43 With this the plaintiff rests.

Mr. McIntosh: Without waiving *or* right to introduce evidence in case the court should be of the opinion that my motion
44 & 45 is not well taken, the defendant moves the court to instruct the jury to return *to* a verdict for the defendant.

Rests until 2 o'clock.

* * * * * * *

46 J. M. Naylor, of lawful age, being by me first duly examined, cautioned and solemnly sworn as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination.

By Mr. BUNN:

1st Ques. You may state your name, age, occupation and place of residence.

A. John M. Naylor; 77 years old; retired merchant and live in Tiffin, Ohio.

47 Q. What was your business formerly?

A. Hardware.

Q. How long have you resided in Tiffin?

A. About 53 years.

Q. Do you remember of the National Exchange bank formerly doing business here?

A. Yes sir.

Q. What was your connection, if any, with it?

A. I was a stockholder and director from its organization to its close.

Q. Was it a corporation or partnership?

Objected to as calling for the conclusion of the witness and not the best evidence.

A. It was a corporation organized under the national banking law.

Defendant moves to strike out the answer of this witness for the reason it calls for a conclusion of the witness and not the best evidence.

Q. When did the National Exchange bank begin business; and how long did it remain in the banking business?

A. It was organized in 1865 and remained in business until 1885. It was in business the 20 years under the law.

Q. Has it exercised its franchise in any way since 1885?

Objected to as indefinite and calling for a conclusion of the witness.

A. Yes sir.

Q. Now, in what respect has it so exercised its franchise?

Objected to as incompetent, immaterial, not sufficient foundation laid and indefinite.

A. It has made deeds this year for the sale of property.

48 It still has real estate in its own name, and I think paper uncollected outside of this note. Now, that is my recollection; in fact, I know it has.

Q. You may state, Mr. Naylor, whether or not you have personal knowledge of its business affairs both while it was in the banking business and since then?

A. Yes sir, I have; but more in its closing times than previously.

Q. What do you mean by "in its closing times"?

A. After we went into liquidation and this new bank, the Tiffin national bank, was formed.

Q. You may state whether or not the National Exchange bank is still in process of liquidation?

Objected to as calling for a conclusion of the witness and immaterial.

A. It is, yes sir.

Q. You may state, Mr. Naylor, if you know, what uncollected claims the National Exchange bank still owns?

Objected to as not the best evidence, no foundation laid, irrelevant and immaterial, and calling for a conclusion of the witness.

A. Yes sir; the claim against Wiley has never been out of its hands; it has always owned it, and it still owns it. I might state further that I received and others have received, recently, dividends from collectible paper or money that was collected by the process of liquidating this National Exchange bank.

Defendant moves to strike out that part of the answer of this witness commencing with "I might state further, etc.," for
49 the reason that the same is not responsive to the question.

Q. In liquidating the affairs of the National Exchange bank has it carried on litigation in its corporate name either as plaintiff or defendant?

Objected to as immaterial, calling for a conclusions of the witness, leading, and not the best evidence.

A. It has used its corporate name for that purpose. I believe I will have to refer that to Mr. Chamberlain because I am not just clear on that. I am satisfied that it has used its name in every other way. Of course, it has collected a great amount of money—it had to; for instance, they declared a 4 % dividend last January on collectible paper on their hands. About their litigation I am not clear; I cannot recall what litigation they have gone into. The amount of litigation don't just come to me now.

Defendant moves to strike out that part of the answer of this witness commencing with, "I am satisfied, etc.," for the reason that the same is not responsive to the question.

Q. Were you one of the directors of the National Exchange bank when its charter expired?

A. Yes sir.

Q. You may narrate in detail what business it has transacted since that date, 1885, as you now remember it or recall it?

Objected to as immaterial.

A. The collection of claims that it had outstanding and
50 selling the real estate that it had on hand and in its name. I guess that covers it.

Q. Mr. Naylor, I will call your attention to a note purporting to have been given to the National Exchange bank in April 26, 1884, by the Wiley Construction Co. and S. L. Wiley; I will ask you who is the owner of that note, if you know, and who is entitled to collect the same?

Objected to as calling for the conclusion of the witness.

A. The Tiffin national bank. No, I don't mean that, that was a slip of the tongue; that wasn't intended to be said. I meant to say the National Exchange bank, that is positive. I am so in the habit of saying Tiffin national bank that I said it without thinking. Of course, in earlier times I used to say the National Exchange bank for the Tiffin national bank; it is as natural for me to say that as a person sometimes writes 1899 for 1900. The National Exchange bank is the owner of that note and entitled to the possession of its proceeds.

Q. You may state, Mr. Naylor, whether you are and always have been acquainted with the facts in regard to this Wiley note?

A. Yes, sir.

Q. If the National Exchange bank had ever parted with that claim, would you know the fact?

Objected to as calling for the conclusion of the witness.

A. I certainly would have known all about it. I would have known it, for Mr. Wiley was the maker and getter up of the
51 note and it was done for him personally and not for the construction Co.

Defendant moves to strike out that part of the answer of this witness commencing with "for Mr. Wiley was the, etc."

Q. You may state what you know about the facts as to whether the National Exchange bank is the owner of that claim now?

Objected to as calling for a conclusion of the witness.

A. It is the owner of it.

Defendant moves to strike out the above answer of this witness for the reason that it calls for a conclusion of the witness.

Q. I will ask you, Mr. Naylor, to state the facts as to whether or not the National Exchange bank ever in any way parted with that claim?

Objected to as indefinite and calling for the conclusion of the witness, and immaterial.

A. In no form whatever.

Q. Who is entitled to the proceeds of the judgment taken upon the Wiley note referred to?

Objected to as calling for a conclusion of the witness.

A. The stockholders of the National Exchange bank.

Q. For what purpose if the National Exchange bank still exercising its franchise?

Objected to as immaterial.

A. For the closing up of the business of the National Exchange bank.

52 Q. That is all.

Cross examination.

By Mr. McIntosh:

Q. Mr. Naylor, what position do you hold in the Tiffin national bank?

A. President and director.

Q. How long have you been president of the Tiffin national bank?

A. I can not give you data. I would have to look that up. John D. Loomis was the former president.

Q. When was the Tiffin national bank organized?

A. In 1885.

Q. Was the Tiffin national bank that you have referred to organized as the National Exchange bank expired?

A. Just about that time, yes sir.

Q. Now, you may state where the offices of the Tiffin national bank are?

A. Corner of Market and Washington streets, Tiffin, Ohio.

Q. Where is the original of the note to which counsel referred as the Wiley note in his questions to you?

A. I don't know that. I presume it is in the hands of the court or in the lawyer's hands. I have no knowledge of that now.

Q. Then counsel has not referred you to any original note in his inquiries in his direct examination?

A. I thought he did.

Q. You think he did?

A. Yes, sir; I thought he had reference to the original
53 note and was interrogating me respecting it.

Q. Is there now or has there been any note purporting to be the original note of Mr. Wiley exhibited to you in the taking of this deposition?

A. No, there has not been.

Q. Counsel, when he spoke of a note in his questions to you, referred to what purported to be a copy of the note that is now on the table at the taking of this deposition, did he not?

A. I don't think he said anything about a copy. He spoke of a note and I supposed his former question was whether it had seen the original note; I have knowledge that there is such a note.

Q. Now, when did you see this note last?

A. I couldn't tell you.

Q. What, sir?

A. I couldn't tell you.

Q. How long ago did you see this note which you refer to now as the original Wiley note?

A. I couldn't tell you, indeed.

Q. Was it a year?
A. I can not tell you.
Q. Do you know where it was within a year?
A. Yes, sir.
Q. Where?
A. It was in the bank here.
Q. In the Tiffin national bank?
A. It was with the other papers that belong to the National Exchange bank.

54 Q. Yes, but was this paper in the Tiffin national bank?
A. Not in the Tiffin national bank as the owner of it.

Q. Be good enough to answer my question; was it in the Tiffin national bank?
A. It may have been. Yes, it was in the vaults of the Tiffin national bank.
Q. Yes; and has been how long?
A. I couldn't tell you. I don't know how long it has been in the lawyer's hands. It may have been in the lawyer's hands more than a year.
Q. And whenever it was not in the lawyer's hands, this original note that counsel referred to as the Wiley note, has been in the vaults of the Tiffin national bank ever since the charter of the Exchange bank expired, is that right?
A. Well, I couldn't tell that; you will have to ask those that have it in custody. I am not an active man on the floor of the bank and never have been.
Q. So far as you know that is where it was, wasn't it?
A. It was with the papers of the National Exchange bank, wherever they kept them, there is where it was. In the vault of the Tiffin national bank, I presume.
Q. Who kept them?
A. Mr. Chamberlain is our cashier; he has charge of all those things.
Q. He is cashier of the Tiffin national bank?
A. Yes, sir.
Q. And wherever he kept them, that is where it was.
A. Yes, sir.

55 Q. Isn't it a fact that this particular note has been in the custody of the Tiffin national bank ever since 1885?

A. Not in its custody as the custodian. It has been in the vault of the bank. The Tiffin national bank gives them place in our vaults but we take no special deposits except at the risk of the owner. Now, it may have been in there in that situation.
Q. Who has been the attorney of the Tiffin national bank for years past?
A. Mr. Ridgely and Lutes & Lutes.
Q. How long have Lutes & Lutes been the attorneys for the Tiffin national bank?
A. I douldn't answer that.
Q. For three years past?

A. Well, probably not.

Q. Two years past?

A. I can not remember how long it is since Judge Ridgley died. Then Lutes & Lutes were attorneys previous to Judge Ridgeley also; and they have been since his death.

Q. Is it as much as two years past since Lutes & Lutes were attorneys for the Tiffin national bank?

A. I haven't the date of the death of Judge Ridgely. They were attorneys for the bank almost immediately after the death of Judge Ridgeley. As I am informed now, Judge Ridgely died the latter part of January, 1899.

Q. Are you able to state now how long Lutes & Lutes were the attorneys for the Tiffin national bank?

A. I think about from February 1st, 1899, down to the present time.

56 Q. Now, who if you know, gave this note you have referred to to Lutes & Lutes to be sued?

A. I presume our cashier did.

Q. And your cashier is J. W. Chamberlain?

A. Yes sir. And he was cashier of the former bank?

Q. He gave this note to Lutes & Lutes to be sued?

A. I can not answer that.

Q. You don't know?

A. No, sir.

Q. Who had power to give it to him, if you know?

A. Well, any of the directors or cashier of the National Exchange bank?

Q. Was this Wiley note to which we have referred one of the discounts of the National Exchange bank at the time it went into liquidation?

A. Yes, sir.

Q. It was a discount item of that bank at that time?

A. Yes, sir.

Q. Who has charge of the books—or where are the books and papers of the old Exchange bank?

A. I think we have them deposited with the Tiffin national bank.

Q. The Tiffin national bank succeeded the old Exchange bank?

A. Yes, sir.

Q. And it was organized by the persons who were the stockholders of the Exchange bank?

A. No sir, in part only.

Q. Was it not officered by the persons who were officers of the Exchange bank?

A. In part.

57 Q. Explain what different officers there were at the time of the organization of the Tiffin national bank from the officers of the old Exchange bank at the time it went into liquidation?

Objected to by plaintiff as immaterial.

A. I can not answer that because I don't just remember. I can come very near, but not to the point unless I look up the books.

Q. The person who was president of the old Exchange bank became the president of the Tiffin national bank, did he not?

A. He did, yes.

Q. And the persons who were directors of the old Exchange bank became the directors of the Tiffin national bank, did they not?

A. In part.

Q. Well tell us what the difference was?

A. I can not tell you, that will have to be looked up; I can not remember that.

Q. I am speaking now of the officers at the time of the organization of the Tiffin national bank?

A. I understand your question.

Q. You say they were different, do you?

A. I think there was a change, but I can not tell you exactly. I think there was a change, but I can not tell you exactly what the change was unless I would look it up and see.

Q. Isn't it true that the stockholders in the Tiffin national bank were substantially as they were in the National Exchange bank?

A. Largely they were.

58 Q. Yes; that is all.

Re-direct examination.

By Mr. BUNN:

Q. What notes were given by the Wiley Construction Co. and S. L. Wiley to the National Exchange bank; more than one, or what?

Objected to as not re-direct examination, not the best evidence, and calling for the conclusion of the witness.

A. He gave two notes. He gave one, a principal note; and one for the interest, I think. That is my recollection now; I might be mistaken.

Q. What was the amount of the principal note?

Objected to as not re-direct examination and not the best evidence.

A. I have forgotten that exactly.

Q. Was it a less amount?

A. Yes, yes, it was a less amount.

Q. You may state whether or not the note for the smaller amount, the interest note, was paid.

A. It was paid.

Q. You may state whether the balance of the $10,000 note is or is not the only claim that the National Exchange bank has against Mr. Wiley or the Wiley Construction Co.

Objected to as not re-direct examination, and not the best evidence.

A. It is the only one that I know of.

Q. You may state then whether that is the note to which you (you) refer in your examination in chief.

A. It is.

59 Q. Who is the custodian of that note?

Objected to as not re-direct examination.

A. I don't know whether it is now in the court's hands or in the lawyer's hands. I am not conversant enough with that fact to tell you.

Q. You don't know then?

A. No, sir.

Q. That is all.

J. W. NAYLOR.

J. W. CHAMBERLAIN, of lawful age, being by me first duly examined, cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz.:

Direct examination:

By Mr. BUNN:

Q. You may state your name, age, residence and occupation.

A. J. W. Chamberlain; age, 62 years; residence, Tiffin, Ohio; occupation, cashier of the Tiffin national bank since its organization.

Q. When was it organized?

A. In 1885.

Q. What was your occupation prior to that time?

A. For a number of years I was a cashier of the National Exchange bank.

Q. Where was the National Exchange bank located?

A. Here in this building in Tiffin, Ohio.

Q. You may state whether or not the National Exchange bank was an incorporation.

Objected to as calling for a conclusion of the witness and not

60 the best evidence.

A. It was a corporation organized under the national banking act.

Q. What has become of the National Exchange bank?

Objected to as not the best evidence.

A. Its 20 years of limit by its charter have expired, and it has been in liquidation ever since; liquidating its whole business.

Q. You may state whether or not you were the cashier of the National Exchance bank at the time its charter expired and began to liquidate its affairs?

A. I was.

Q. Who has been the custodian of these papers, records, etc., since that time?

A. Well, I do not exactly understand what is meant by custodian.

Q. What became of the records, papers and claims, etc., of the National Exchange bank when it ceased to do a banking business?

A. They remained in the control of the board of directors of the National Exchange bank.

Q. And you having been cashier of that bank, you may state what the facts are as to whether or not any of them remain still in your possession?

A. They are still under the control of the board of directors and kept in the vaults of the Tiffin national bank to which I have access as cashier of the National Exchange bank.

Q. What use, if any, has the National Exchange bank made of its franchise since it ceased to do a banking business?

61 A. Well, it has continued to collect its claims and to pay out dividends, when a sufficient amount was collected to its stockholders, and to dispose of the real estate it had and execute deeds for the same.

Q. Do you remember the note which the National Exchange bank held, if it did hold any, against Wiley Construction Co. or S. L. Wiley.

A. Yes, sir.

Q. I refer to the note given April 26, 1884, for $10,000; you may state whether or not there was such a note.

Objected to for the reason that the question assumes that such a note was given and the best evidence has not been produced.

A. There was.

Q. Do you know where the note now is?

A. I do.

Q. Have you access to it?

A. I have.

Q. Will you produce it?

A. I will. This is the original note, and this is a copy of it.

Q. Will you allow the stenographer to attach a copy of that note to this deposition as an exhibit marked "A"?

A. Yes, sir. I now hand a copy of it to the stenographer and request him to attach it to my deposition as Exhibit "A."

Q. Who is the owner of that note and the judgment passed upon it at this time?

62 Objected to as calling for a conclusion of the witness and not the best evidence.

A. The National Exchange bank.

Q. If the National Exchange bank had ever parted with that note or the judgment passed upon it, would you know the fact?

A. Yes, sir.

Q. You may state whether or not the National Exchange bank has ever parted with that note or the judgment taken on the note?

Objected to as calling for a conclusion of the witness.

A. It has not.

Q. Who is entitled to the proceeds of that note or the judgment taken upon it?

Objected to as calling for a conclusion of the witness.

Q. Mr. Chamberlain, I will ask you to look at the petition in the case of The National Exchange Bank of Tiffin, Ohio, *vs.* The Wiley Construction Co., and S. L. Wiley, being case No. 11278 in the court of common pleas of Seneca county, Ohio, and ask you whether the note mentioned in that petition and what purports to be a copy of it attached to the petition, is the same note that you have been testifying about and which you here exhibit to the stenographer?

Objected to for the reason that no foundation has been laid and for the further reason that it is immaterial.

A. It is a copy of the note.

Cross-examination.

By Mr. McIntosh:

Q. Mr. Chamberlain, have you the records of the meetings
63 of the board of directors of the National Exchange Bank of Tiffin, Ohio?

A. Yes, sir.

Q. Will you please produce them and also the records of the meetings of the stockholders of the National Exchange bank?

A. Yes, sir; I have them here.

Q. Will you turn in the records which you have produced to the meeting that occurred February 2, 1885, when the National Exchange bank went into liquidation?

A. I find no meeting on that date; here are meetings on the 3rd and the 10th.

Q. Uh huh; I will ask you if you have any record of the meetings of the directors or stockholders of the National Exchange Bank of Tiffin, Ohio for 1899?

A. No, sir—not for 1899; I find none now.

Q. Now, Mr. Chamberlain, was this Wiley—was this note you have referred to as the Wiley note, one of the discount asset or item of the National Exchange Bank of Tiffin at the time it went into liquidation?

A. Yes, sir.

Q. Where has that note remained since 1885?

A. It has remained in a pocket book belonging to the National Exchange bank with other papers.

Q. Yes, but where has it been; hasn't it been in the vaults of the Tiffin national bank?

A. All their books and papers are kept in the vaults of the Tiffin national bank.

64 Q. Yes; and they were under the control of the officers of the Tiffin national bank, weren't they?

A. No, sir. They were under the control of the directors of the National Exchange bank.

Q. Uh huh; now, you may state who gave the Wiley note to Lutes & Lutes, attorneys, at the time it is claimed they put it in judgment?

A. I think I handed it to them myself (by the direction of the directors of the Exchange bank).

Defendant moves to strike out that part of the answer of the witness commencing with "by direction of the directors, etc.," for the reason that it is not responsive to the question.

Q. Where did you get it when you handed it to Lutes & Lutes; did you get it out of the vaults of the Tiffin national bank?

A. I got it out of the pocketbook belonging to the National Exchange bank which was kept in the vaults of the Tiffin national bank.

Q. And at the time you gave it to Lutes & Lutes, you were the cashier of the Tiffin national bank, were you not?

A. Yes, sir.

Q. And Lutes & Lutes were the attorneys of the Tiffin national bank at that time, were they not?

A. Yes, sir.

Q. I think that is all.

Re-direct examination.

By Mr. BUNN:

Q. When you delivered this note to Lutes & Lutes, attor-
65 neys, did you do so on your own motion or under the direction of some other authority?

A. I done it under the direction of the directors of the Exchange Bank.

Q. Did the Tiffin national bank ever have any interest in this note in any way whatever?

Objected to as not *in*-direct examination and also for the reason that that matter has been gone into.

A. No, sir.

Q. That is all.

Re-cross examination.

By Mr. MCINTOSH:

Q. How long was it after you got the direction of the director of the National Exchange bank to deliver this note to Lutes & Lutes, that you did so—within a day or so, or what?

A. It was a very short time. It can not tell whether it was only hours or a day or two.

Q. A day or two you think?

A. Yes, sir. It couldn't have been longer than that.

Q. How long after Lutes & Lutes received it did they put it in judgment?

A. My recollection is that they done it at once.

Q. They did it at about the same time?

A. Yes, sir.

Q. Or within a day or two?

A. Yes, sir.

Q. Who were the directors of the National Exchange bank
66 in 1899?

A. John M. Naylor, George D. Loomis and Albert Buskirk.

Q. That is all.

J. W. CHAMBERLAIN.

JOHN MCCAULEY, of lawful age, being by me first duly cautioned and solemnly sworn, as hereinafter certified, deposeth and sayeth as follow-, viz.:

Direct examination.

By Mr. BUNN:

Q. You may state your name, age, residence and occupation?

A. My name is John McCauley; age 64 years; residence, Tiffin, Ohio; occupation, attorney at law.

Q. How long have you practiced law?

A. I have practiced law 40 years nearly. I began practicing in 1860.

Q. Where have you practiced law during all that time?

A. Here in Tiffin, Ohio, all that time.

Q. Have you at any time held any official positions?

A. Yes. I have held office a little.

Q. What judicial positions have you held?

A. Well, I was common pleas judge here for 3 years—elected for a term of 5 years, and before it was out I resigned it.

Q. What other judicial position have you held?

A. Well, I was a member of the supreme court commission for two years.

Q. What is the court of last resort, the highest court, in Ohio?

A. The supreme court of Ohio.

67 Q. What other courts are there in Ohio?

A. The supreme court is the highest court; then the next below it is the circuit court; below that is the common pleas court, and next below that is the justice of the peace court.

Q. What jurisdiction does the court of common pleas exercise——

Objected to as incompetent.

A. The court of common pleas has general jurisdiction in law and equity.

Q. What relation to the supreme court did the supreme court *did the supreme court* commission sustain?

A. Just the same as the supreme court. There was no relation particularly, except that it was another court just like the supreme

court, composed of the same number of judges with the same jurisdiction. It was created to assist the supreme court along with its business. The supreme court commission had the same powers as the supreme court.

Q. Are you acquainted with the practice and precedents of the courts of Ohio in regard to entering judgments on warrants of attorney?

A. Yes sir.

Q. Do the courts of Ohio exercise the authority of entering judgments on warrants of attorney?

Objected to as leading, not the best evidence and incompetent.

A. Yes, they do.

Q. You may state what the practice and the law in Ohio is in regard to entering judgments by confession on warrants of attorney?

Objected to as incompetent, immaterial and not the best
68 evidence.

A. A note with a warrant of attorney attached to it purporting to authorize a particular attorney or any attorney at law to confess a judgment in favor of the holder thereof after it becomes due, may be put in judgment by the attorney authorized or by any attorney authorized to confess the judgment, and such judgments have for more than half a century been recognized and held to be regular and valid judgments in this State.

Defendant moves to strike out that part of the answer of this witness commencing with "and such judgments, etc.," for the reason that that part of said answer is not responsive to the question.

Q. What is the usual form of such warrants of attorney attached to notes in Ohio, and especially in regard to waiving the service of process or notice and entering the appearance of the maker of the note?

Objected to as not material and not the best evidence.

A. These forms of warrants of attorney are quite varied. The usual form though is, that a particular attorney at law, naming him, or any attorney at law may appear for the maker of the note, after it has become due, and confess a judgment in favor of the holder of the note, or payee of the note, or of anybody that may be designated in the note, and waive all errors and writs of error, and waive all right to appeal the latter has no legal meaning, because it is not appealable anyhow. That is the form that is generally used.

69 Q. And what about waiving process or notice?

A. Yes, it gives them power to waive the issuing and service of process; and gives them power to enter the appearance of the maker of the note and confess a judgment against him. That is the general form. But they are very much varied. During the Bohemian Oats season here they got them twisted in all kinds of shape.

Q. Have the courts of Ohio acted upon the authority of such warrants of attorney as you have described?

Objected to as immaterial and not the best evidence.

A. Yes, yes; they have acted upon it for 60 years past. It has been the common practice for 60 years.

Q. Is that practice authorized by statute or decisions and precedents?

Objected to as not the best evidence and immaterial.

A. I think the practice in the first place arose in the *mutual* order of business and was based upon the power of a party to make a power of attorney; but the exercise of it has been regulated and modified by statute, and distinctly recognized by statute for a long time.

Q. Can you refer to some decisions of the supreme court of Ohio in which that law and that practice is sustained?

A. Oh, yes; yes, I can.

Q. If you can, you may mention some of the decisions of the supreme court of Ohio in which that practice has been sustained?

Objected to as incompetent, not the best evidence and as calling for a conclusion of the witness.

70 A. The doctrine on this subject was gone over thoroughly and nearly all cases previously decided reviewed in the case of Spence *v.* Emerine, 42 O. S. Report, the page I do not now remember. The opinion in that case brought in review a great many of the cases on that subject, going back as far as the 19 O. Report.

Q. Has that case or any of the cases reviewed by the opinion of the supreme court been reversed, or are those cases still the law in Ohio?

Objected to as immaterial and not the best evidence.

A. None of them have been overruled; they are all law in Ohio. They vary a little, of course; they involve different points of the law of cognovit or warrant of attorney. There are no two of them exactly alike; they vary in some respects—different points of law being involved in them. But none of them have been overruled—none of them.

Q. What is the practice generally about courts requiring notice to be given to defendants before entering a judgment on a warrant of attorney?

Objected to as immaterial.

A. Some courts require it, and some do not. It never was required in this county. I tried once to take a judgment in *Cincinnatti* for this same bank, and they read a rule of the court on me that required notice to be given the defendant, but they waived the rule and I took the judgment. I think the general practice is not to require a notice.

Q. I will ask you to look at the petition in the case of The

National Exchange Bank of Tiffin, Ohio, *vs.* Wiley Construction Co. and S. L. Wiley, being case No. 11276, in the court of
71 common pleas of Seneca county, Ohio, and especially at the copy of the note with warrant of attorney attached to that petition?

A. Yes, I have looked at it.

Q. Is that a common form of cognovit; is that a common form of a cognovit note in Ohio?

Objected to as immaterial and for the reason that no foundation has been laid.

A. Yes, I think so. Yes, that is in the usual form—in a form that would authorize a judgment to be confessed and entered up by any court of record in favor of the holder.

Defendant moves to strike out that part of witness's answer commencing with "in a form that would authorize," for the reason that the same is not responsive to the question.

Q. Would that kind of a note authorize my attorney to go into court, waive the issuing and service of process or notice for the maker of the note, and enter his appearance and confess a judgment without notice to the defendant?

Objected to as incompetent, as calling for a conclusion of the witness, as not the best evidence, and immaterial.

A. Yes; I think the question is distinctly settled in Ohio by a decision of the supreme court that a judgment might be rendered in just such a case. I cannot give the name of the case without referring to the book, and I have not got the book here.

Q. Do I understand you correctly to say that you were familiar with the decisions upon that subject of the highest court in
72 Ohio?

A. I hardly know what to say to that. It was only a few years ago when we argued this very question in the supreme court of Ohio ourselves—that is, my partner and I—and they at that time decided this case in the 46 O. S. Rep., and that case involved a review of nearly all the cases on the subject in the State. And, of course, I remember some of the points that we argued to the court there. The court overruled and beat us. That is the way I came to be familiar with the cases on that subject.

Q. You may state again whether this practice in Ohio and the jurisdiction which the courts exercise in such cases was created by statute or only regulated by statute?

Objected to as not the best evidence and incompetent.

A. I think it was not created by any statute, but it has been recognized and regulated by statute. That is all there is of it, I think.

Q. Can you at this time refer to or cite any of the sections of the Ohio statutes that do regulate such practice?

A. I could not without the statutes before me. I think it is regu-

lated to some extent in section 5321 of the Revised Statutes of Ohio.

Q. That is all.

Cross examination.

By Mr. McINTOSH:

Q. Is it customary, Judge, in Ohio to sue on one of these cognovit notes and after you get beat then to take it into another juris-
73 diction and have a lawyer confess a judgment against the maker of the note; is that the custom in Ohio?

A. On the same note?

Q. Yes, sir?

A. I should not think that was customary anywhere.

Q. Would you call that a valid judgment, Judge?

A. Oh, I don't know.

Q. Would that be a valid judgment in Ohio; what is your opinion about that Judge?

A. Well, that would involve a good many considerations, you know.

Q. Well, be good enough just to answer my question?

A. I should certainly be doubtful about it.

Q. You think it would not be a valid judgment?

A. No; I should be doubtful about that—whether it was good.

Q. That is all.

Re-direct examination.

By Mr. BUNN:

Q. That kind of a judgment would be in force until it was reversed, vacated or set aside in some way, would it not?

A. I think likely it would. It would have to be recognized while it stood.

Q. And a good lawyer wouldn't have any great trouble in getting that kind of a judgment vacated and set aside?

A. No. One judgment on the same note is enough anywhere. And if there were two rendered, it would not be hard to get rid of the second one. One judgment is enough on the same note in any State.

—. But a sheriff or other officer or person with a process or
74 writ in his hands issued upon such second judgment would not know what to do with it except to go on and serve it—wouldn't know but what it was good; he would have to act upon it until the courts settled it; he would have to recognize it until the courts acted upon it, wouldn't he?

—. I do not see how else it could be. But how far that would bind a court outside of the State, I wouldn't want to say. My impression is, that I would be a little afraid of it outside of the State.

Q. Well, that is all.

JOHN McCAULEY.

J. W. SCHAUFELBERGER, of lawful age, being by me first duly cautioned and sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

Direct examination.

By Mr. BUNN:

Q. You may state your name, age, residence and occupation.
A. My name is J. W. Schaufelberger; age, 46 years; residence, Tiffin, Ohio; I am judge of the court of common pleas.
Q. Are you a lawyer by profession?
A. I am.
Q. How long have you practiced law?

Defendant admits that Judge Schaufelberger is a competent expert on the laws of Ohio.

Q. How long have you been judge of the court of common pleas?
A. Nearly eight years.
Q. Are you acquainted with the decisions of Ohio relating
75 to cognovit notes or warrants of attorney to confess judgments?
A. I believe I am.
Q. And with the practice of the courts of Ohio respecting cognovit notes?
A. I think so.
Q. Do the courts of Ohio recognize the authority given by a warrant of attorney to confess judgments?
A. Yes, sir.
Q. What are the usual forms of these warrants of attorney attached to promissory notes?

Objected to as not material.

A. The warrant or power of attorney annexed to notes usually authorizes or empowers some attorney at law, naming him, or in general terms, any attorney at law, to appear before any court of record after the note becomes due and waive the issuing and service of process, and confess a judgment against the makers or any of them, in favor of the legal holder or endorsee of the note for the amount then appearing due thereon, and costs of suit; also to release all errors and writs of errors.
Q. And enter the appearance of the maker or makers of the note?
A. Yes, sir.
Q. I will ask you to look at the note attached as an Exhibit "A" to the deposition of J. W. Chamberlain, and ask you whether that is one of the forms common in Ohio?

Objected to as not material.

A. It is.

76 Q. On a warrant of attorney of that kind, do the courts of Ohio enter judgment when an attorney appears with the original and confesses judgment?

Objected to as immaterial and as calling for a conclusion of the witness.

A. They do.

Q. What if any notice do the courts of Ohio require to be given to the maker of the note before entering a judgment on a warrant of attorney of that kind?

A. None whatever.

Q. Is that practice santioned by the decisions of the highest court of Ohio?

Objected to as not the best evidence.

A. Yes, sir.

—. ——.

Q. Is it not created by statute, but it is recognized in several instances by them. One which I have in mind now is section 5324 of our Revised Statutes, which provides in substance that an attorney who confesses judgment in any case shall at the time of making such confession produce the warrant of attorney for making the same to the court before which he makes the confession, and the original or a copy of the warrant shall be filed with the clerk of said court.

Q. Can you refer to any of the decisions of the supreme court of Ohio sustaining the practice of the courts in thus entering judgments on warrants of attorney?

A. I do not know that I have any reference on my tongue's end. There are a number of such decisions by the supreme court. I have in mind now one from this county, namely, that of

77 Spence *v.* Emerine, decided in the 46 Ohio State report. In that case the supreme court held that the warrant of attorney in question conferred no authority to confess judgment against the maker of the note in favor of the holder or to whom the payee had transferred it by delivery. The warrant of atterney in that case did not authorize the confession of a judgment in favor of the holder or indorsee of the note, but only authorized such confession against the makers thereof. The note having been transferred by the payee, and warrant not authorizing a confession in favor of anyone else than the payee, the court held it error to enter judgment by confession because of want of authority conferred by the warrant to confess judgment in favor of the holder or indorsee.

Q. That is, it reversed the lower court for entering judgment in favor of an indorsee where a note did not specially provide for that?

A. Yes, sir.

Q. And this law—now, are those decisions of the supreme court of Ohio still the law, or have those decisions been reversed?

A. Oh, no; that is the general law of this State.

Q. And this law and the practice under it, you say, is not created by statute but is the unwritten law of this State?
A. Yes, sir.
Q. That is all, Judge.

Cross examination.

By Mr. McINTOSH:

Q. Is it not true that in some of the counties of this State
78 a judgment cannot be obtained on these notes upon warrants of attorney, such as you have described and such as that copy which is attached to the deposition of Mr. Chamberlain, without first giving to the defendant notice?
A. I think in a few counties in this State under a rule of court notice is required to be given to the makers before judgment can be taken. But by such notice is not meant legal process issuing from the court in which judgment is taken, but a reasonable notice given to the makers of an intention to take judgment upon a note with a warrant of attorney attached at a given time and served by the attorney or holder of the note upon the makers. This rule, I believe, prevails in Hamilton county.
Q. That is the county in which the city of *Cincinnatti* is located?
A. Yes, sir. But no such rule has ever prevailed in this county.
Q. That is all.

J. W. SCHAUFELBERGER.

EXHIBIT A.

Copy.

$10,000.00. TIFFIN, OHIO, *April* 26, 1884.

October 1st, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange bank, or order, at its office in Tiffin, Ohio, ten thousand dollars, with 8 per cent. interest after maturity.

N. L. Brewer or

And hereby authorize any attorney *of* law in the United States or elsewhere, to appear before any court of record, after the
79–90 above obligation becomes due, and waive the issuing and serving of process, and confess a judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and writs of errors, and waive all right to appeal, and stay of execution, in our behalf, or in behalf of either of us.

Second trial.

WILEY CONSTRUCTION CO. [SEAL.]
S. L. WILEY, *Pres't.* [SEAL.]
S. L. WILEY. [SEAL.]

P. O., Greenfield, Mass.
Due Oct. 1st.

S. GATTON,
Notary Public.

(Ex. A.)

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91 At the suggestion of Mr. Lutes, of counsel for the plaintiff, and for the convenience of the witnesses in the production of the papers and records called for in the subpœna, the taking of said testimony was adjourned to the office of the Tiffin national bank, where the records and books called for in the subpœna are kept.

TIFFIN, OHIO, *February* 2, 1900—2 o'clock p. m.

Pursuant to the adjournment, the taking of these depositions was resumed at the office of the Tiffin national bank.

Present, same parties heretofore named.

JOHN W. CHAMBERLIN, of lawful age, being first examined, cautioned, and solemnly sworn, testified as follows:

Examined in chief for the defendant by JAMES H. MCINTOSH:

Q. State your name, age, place of residence, and occupation.

A. John W. Chamberlain; sixty-two; Tiffin, Ohio; cashier of Tiffin, national bank.

Q. How long have you been cashier of the Tiffin national bank?

A. Since about February, 1885.

Q. What was your business prior to that time?

A. For several years cashier of the National Exchange bank.

Q. Is the National Exchange bank still engaged in business?

92 Objected to by counsel for plaintiff, as incompetent, immaterial and irrelevant.

A. Only in liquidation.

Q. When did the National Exchange bank go into liquidation?

Objected to by plaintiff as incompetent, irrelevant and immaterial.

A. It was in—I am not positive of the day of the month—it was in February, 1885.

Q. Were you a director of the bank at that time and a stockholder?

Objected to by counsel for plaintiff as before.

A. I was not a director, and not a stockholder.

Q. Were you its cashier at the time it went into liquidation?

Objected to by plaintiff as incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. Do you know what form of proceedings were adopted by the directors and the stockholders or by either of them incident to going into liquidation?

Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial.

A. I can not tell from memory alone.

Q. Have you in your possession, as cashier of the Tiffin national bank, or otherwise, any books, papers or records, purporting to show the proceedings that were adopted by the stockholders and directors, or by either of them, incident to going into liquidation of the National Exchange bank?

93 Objected to by counsel for plaintiff on the same grounds as before.

A. I will have to ask a little explanation of that question first. You say, have I any books,—records, of the Tiffin natioual bank. The Tiffin national bank was not in existence at that time.

Q. I refer to the books and records of the National Exchange bank.

A. Yes, I have.

Counsel for the plaintiff objects to said answer, on the grounds above stated.

Q. Have you in your possession the articles of association and the by-laws of the National Exchange bank?

Objected to by counsel for the plaintiff, as before.

A. They are in the bank vaults.

Q. Can you produce them?

Objected to by plaintiff, as before.

A. Yes.

Q. What is the book that you have produced, and *how* have in your hand?

A. Minute-book number one (1) from National Exchange band.

Q. Does that minute book contain the articles of association of the bank, and the by-laws?

A. It does.

Q. Will you turn to that part of the book where the articles of association are recorded? Are the articles of association that I have called for, recorded in the book that you hold in your hand, commencing on page 4?

94 Objected to by counsel for plaintiff, as immaterial, incompetent, and irrelevant.

A. Yes.

The answer is objected to by counsel for plaintiff, as before.

Q. When the National Exchange Bank of Tiffin went into liquidation who was given, if you know, the custody of its records, books, papers and assets?

Counsel for plaintiff objects as before, on the ground that the question is immaterial, irrelevant and incompetent.

Q. Why, the books and papers were left in the vault of the Tiffin national bank.

Q. Is the Tiffin national bank the successor to the National Exchange bank?

Same objection by the plaintiff.

A. It succeeded the National Exchange bank, but not with just the same stockholders.

And to the answer the plaintiff objects as before.

Q. And as cashier of the Tiffin national bank you have had in your cu-tody in the vault of the Tiffin national bank, the records of the National Exchange bank from the time it went into liquidation, have you?

Counsel for the plaintiff objects to the question on the ground that it is immaterial, incompetent, and irrelevant.

A. I won't say that they were in my custody, but in the custody of the Tiffin national bank.

Q. And you have been its cashier ever since its organization in 1885. Is that true?

95 A. Yes sir.

The defendant now offers in evidence the articles of the National Exchange Bank of Tiffin, Ohio, produced by the witness, and commencing on page 4 of the book the witness now has before him, and concluding on page 6 of said book, a copy of which is attached to this deposition, and marked Exhibit "A."

To which evidence so offered, the plaintiff objected on the ground that it was incompetent, irrelevant and immaterial.

Q. Have you before you in the records which you have just produced the organization certificate of the National Exchange Bank of Tiffin?

Objected to by counsel for plaintiff, as incompetent, irrelevant and immaterial.

A. I have a copy of it.

Q. Is it the recorded copy of the bank in its record book?

Same objection by the plaintiff.

A. Yes.

Q. Where is it found in the record book that you have produced?

A. On pages 2 and 3.

The defendant offers in evidence the organization certificate as recorded on pages 2 and 3 of the record which the witness has produced, being the whole of said two pages, a copy of which is hereto attached, marked Exhibit "B" and made a part of this deposition.

96 To which evidence so offered the plaintiff objects on the ground that it is incompetent, irrelevant and immaterial.

Q. Is the bank whose articles of association have been offered in evidence as Exhibit "A" and whose organization certificate as Exhibit "B" the only bank having "national exchange" as a part of its official banking name that has ever had offices or place of business in Tiffin, Ohio?

Objected to by counsel for the plaintiff as irrelevant, incompetent and immaterial.

A. I have only lived in Tiffin a certain number of years. I can not tell what may have been here before my time?

Q. How long have you lived in Tiffin?

A. Twenty-five years.

Q. Is the bank whose articles of association and certificate of organization that have been offered in evidence as Exhibits "A" and "B" respectively, the only bank that had the words "national exchange" as a part of its corporate name that had offices in Tiffin since you lived here at any time during the last twenty-five years?

A. It is, so far as I know of.

Q. If there had been any other bank would you have known of it?

A. I suppose so.

Q. Have you been in the banking business during those twenty-five years in Tiffin?

A. Not all the time.

Q. What part of these twenty-five years were you not in the banking business in Tiffin?

A. Prior to May, 1878.

97 Q. Have you before you the by-laws of the National Exchange Bank of Tiffin?

A. I have.

Q. Are they in the record book that you have produced and from which the articles of association of said bank were taken and introduced in evidence?

A. Yes, sir.

Q. Will you turn to them in that record?

A. They commence on page 12 and they end on page 17.

To all of which questions and answers the plaintiff objects on the ground that they are incompetent, irrelevant and immaterial.

The defendant now offers in evidence as Exhibit "C" the by-laws of the National Exchange Bank of Tiffin, now produced by the witness, commencing on page 12 of the record of said bank and ending on page 17 thereof, a copy of which is hereto attached and made a part of this deposition and marked Exhibit "C."

To which evidence the plaintiff objected on the ground that it was incompetent, irrelevant and immaterial.

Q. Have you before you said bank's record of the certificate of the Comptroller of the Currency, of authority to act as a national bank?

Objected to by the plaintiff on the same grounds as stated before.

A. The certificate of the deputy comptroller,—a copy of it.

Q. Where does that certificate appear on the records of the bank that you have produced?

Same objection by the plaintiff.

98 A. Page 11.

The defendant now offered in evidence as Exhibit "D" the certificate of authority to act as a national bank, from page 11 of the record before the witness, a copy of which exhibit is hereto attached and made a part of this deposition.

To which evidence the plaintiff objected on the ground that it is incompetent, irrelevant and immaterial.

Q. Have you before you the record of the meeting of the stockholders and of the directors, or of either of them pursuant to the going into liquidation of the National Exchange Bank of Tiffin?

A. I have the record of the directors' meetings.

Q. Where do they appear on the record which you have before you?

A. Commencing on page 302.

Q. Commencing on page 302, *is* the book- that you have before you the regular records of the directors' meetings, as they were held consecutively, of the National Exchange Bank of Tuffin?

A. Yes.

To which questions and answers the plaintiff objects on the same grounds as stated heretofore. The defendant offers in evidence the records of the meetings of the directors of said National Exchange Bank of Tiffin, produced and identified by the witness, commencing at page 302 of the record before the witness, with the meeting of Tuesday, February 24, 1885, including also the meeting of Tuesday, February 24, 1885, including also the meeting of March 2", 1885, on pages 303 and 304, and the meeting of March 3, 1885, commencing at the top of page 305, and concluding with the words "John W. Chamberlain, cashier," one or two lines below the middle of page 305, the records of said meetings being identified as Exhibit "E," a copy of which record is hereto attached.

99

To all of which the plaintiff objects on the ground that it is incompetent, irrelevant and immaterial.

Q. Mr. Chamberlain, can you produce the discount ledger of the National Exchange Bank of Tiffin, for April, 1884; also the collateral ledger of the bank for the same time?

A. We have no books known by those names.

Q. How, in your method of book-keeping, in April, 1884, did you keep account of collateral received as security for paper the bank discounted, or security for loans?

Objected to by counsel for the plaintiff, for the same reasons as before stated.

Q. At that time we made very few loans on collateral, and the record of them—when we did make a loan on collateral, we placed it in an envelope, with the name endorsed on the outside, of the party depositing it, the description of the collateral, date when deposited, and what it was security for, and we kept those in a separate box,—a collateral box.

Q. When you made a loan, what record on the books of the bank did you make to keep a book account of the loan?

A. We have what was called a discount register, which I suppose is the same that you referred to.

100 Q. Will you produce the discount register for April, 1884, of the National Exchange Bank of Tiffin?

A. Yes, sir.

Q. Have you before you the discount register for April, 1884, of the National Exchange Bank of Tiffin?

A. Yes, sir——

Q. Examine that register and see if there is any record of a loan to the Wiley Construction Company, under date of April 26", April, 1884?

And to this and the *preceeding* questions and answers counsel for plaintiff objects, on the ground that they are incompetent, irrelevant and immaterial.

Q. Do you find any such entry?

Objected to by the plaintiff as above.

A. Yes, sir.

Q. Where is it on the discount register that you produce?

Objected to by the plaintiff as above.

A. Page 147, number- 45170 and 45171.

Objected to by the plaintiff as before.

The defendant no- offers in evidence as Exhibit "F" the record from the discount register of said bank produced by the witness, on page 147, consisting of the headings of each column, including the dates at the heads of the columns, and the two lines numbered 45170 and 45171.

To which counsel for the plaintiff object on the ground that it is incompetent, irrelevant and immaterial.

Q. In Exhibit "F," in the column headed "days" there is the letter "R" in lead pencil. What does that letter signify, Mr. Chamberlain?

101 Objected to by the plaintiff on the grounds hereinbefore stated.

A. That it was a renewal.

Q. There is no letter "R" in the line numbered 45171 in the column headed "days." What is the significance of the absence of the letter "R" in that line and column?

Objected to by counsel for plaintiff, as incompetent, irrelevant and immaterial.

A. That it was a new loan.

Q. Was the discount item number 45171 a new loan or was that interest on the discount item in the column above it?

Objected to by counsel for the plaintiff, for the same reasons as stated above.

A. My impression is that it was interest.

Q. Now, can you turn to the discount entry in the book that you have before you, of the item of which the entry number 45170, being a part of Exhibit "F" is a renewal? If so, you may do so.

Objected to by counsel for plaintiff, as before.

A. Two items, numbered 44070 and 44071, page 123.

Objected to by counsel for plaintiff, as before.

The defendant offers in evidence as Exhibit "G" the two lines identified by the witness, as the discount register entries of loans number 44070 and 44071, including the headings of the columns, and the dates.

To which evidence the plaintiff objects, on the ground that it is incompetent, irrelevant and immaterial.

Q. Was there any subsequent renewal of the discount items offered in evidence as Exhibit "F" recorded on page 147, numbers 45170 and 45171 of said book?

102 Objected to by counsel for the plaintiff on the same grounds as before.

A. No.

Q. Have you the paper that was made by the Wiley Construction Company at the time the two entries constituting Exhibit "F" were made? If you have, produce them. I mean the original notes.

Objected to by the plaintiff, who objects to the production of the paper as it was not called for in the subpœna, and is incompetent, irrelevant and immaterial.

The matter being submitted to the notary, he decides that the word "contracts" in the subpœna covers the notes, and the witness is directed to produce them.

Q. Is the paper which has been identified as Exhibit "H" the paper that was given and of which loan No. 45170 in Exhibit "F" is a record?

A. It is.

Q. And is the paper which the notary has identified as Exhibit "I," the paper of which the loan No. 45171, (is) Exhibit "F" is a record?

A. It is.

The defendant now offers in evidence Exhibit "H" and Exhibit

"I," with all the endorsements thereon, copies of which are hereto attached marked respectively as Exhibit "H" and "I" and made a part of this deposition.

To all of which questions and answers and exhibits counsel
103 for the plaintiff objects, on the ground that they are incompetent, irrelevant and immaterial.

Q. Is Exhibit "H" the same paper that formed the subject matter of the action brought in the court of common pleas for Seneca county, and the State of Ohio, by National Exchange Bank of Tiffin, Ohio, plaintiff, against Wiley Construction Company and S. L. Wiley, defendants, on the 31" day of July, 1899, and upon which, on said 31" day of July, 1899, and in said court, a judgment purports to have been entered against the said defendants therein, and which forms the subject matter of the present suit in the district court for Douglas county, Nebraska, in which National Exchange Bank, of Tiffin, Ohio, is plaintiff, and Solon L. Wiley, is defendant?

Counsel for the plaintiff objects on the grounds that the question is incompetent, irrelevant and immaterial.

A. It is.

Q. When in making a loan the National Exchange Bank of Tiffin took collateral as security, where on the books of the bank did it show that collateral had been taken?

Counsel for plaintiff objects to the question as leading, incompetent, irrelevant and immaterial.

A. I am unable to say positively whether we had a collateral book at that time. I think not. I have not been able as yet to find it if there was one. Those old books—twenty years ago—stored away up there in the attic. I haven't found such a book yet.

Q. If you took collateral and put the collateral in an envelope, as you have explained, what record if any did the bank keep
104 of the fact that it has had collateral for that loan, after it had realized upon the collateral and surrendered it?

Objected to by counsel for the plaintiff, as incompetent, irrelevant and immaterial.

A. Why, where collateral was disposed of, and applied to the payment of the note, there was no further record to be kept of it than that.

Q. Where in the records of the National Exchange Bank of Tiffin would you search for the purpose of ascertaining whether or not the bank ever held collateral as security for the loan that is known on your discount register as No. 45170?

Objected to by counsel for the plaintiff on the same grounds as before.

A. Loans of that amount, as far as I can recollect at that time were so few that any arrangement about collateral was known without any further record of it than that. As I say, I cannot tell now. It

is impossible for me to say whether there was a collateral book or not. I don't think there was. We have been accustomed for a great many years now always invariable of making a pencil mark of collateral on the note.

Q. Will you be good enough to examine the records of the National Exchange Bank of Tiffin, and ascertain from them whether or not there was collateral security for the payment of Exhibit "H"?

And to the last question on the preceeding page the plaintiff objected on the same grounds as heretofore.

At this point the further taking of this deposition was adjourned at 9 o'clock a. m., Saturday, February 3", at the same place,
105 the office of the Tiffin national bank.

TIFFIN, OHIO, *February* 3, 1900—9 o'clock a. m.

Pursuant to the adjournment had on yesterday, the further taking of these depositions was resumed this morning, in the office of the Tiffin national bank.

Present, same parties as on yesterday.

The further examination of the witness, JOHN W. CHAMBERLIN was continued,—questioned in chief by Mr. McIntosh.

Q. Now, Mr. Chamberlain, if you want to make any corrections, as you say you do, you can proceed with your corrections.

A. It was in regard to the question as to who had control of the books and papers of the National Exchange bank. The president and cashier and directors of the National Exchange bank, at the time it went into liquidation, became the same officers in the Tiffin national bank, under the direction of the board of directors of the National Exchange bank and were subject to their control.

By Mr. LUTES: And still are.

By WITNESS: And still are.

Q. Who were the directors of the National Exchange Bank of Tiffin, when it went into liquidation in March, 1885?

A. R. W. Shawhan, J. D. Loomis, J. M. Naylor, A. Buskirk and George D. Loomis.

Q. Who, if any, of the directors that you have just named
106 have died since March, 1885?

A. R. W. Shawhan and John D. Loomis.

Q. Was there ever an election of directors of the National Exchange Bank of Tiffin, after March, 1885?

Objected to by counsel for the plaintiff, as incompetent, irrelevant and immaterial.

A. There was not.

—. Mr. Chamberlain, I notice on the back of Exhibit "H" an endorsement as follows: "May 9, 1887. Paid on the within $6311.75." Look at that endorsement and state whose handwriting that endorsement is in, if you know?

Objected to by counsel for the plaintiff, as before.

A. It is in my handwriting.

Q. On the back of Exhibit "I" see the following endorsement, to-wit: "Paid Oct. 13, 1884. $455.00. May 9, 1897, paid in full, $188.25." Whose handwriting, if you know, are those two endorsements in?

Objected to by counsel for the plaintiff, for the same reasons as stated before.

A. The last endorsement is in my writing. The first one I am not positive whose writing it is.

Q. According to the method of keeping the books at the time these two endorsements of May 9" were made, where would the money received, which was noted in those two endorsements, be entered upon the books?"

Objected to by the plaintiff, as incompetent, irrelevant and immaterial.

A. Well, it would appear in the business transactions of
107 that day.

Q. Name the books and entries where it should appear?

Objected to by plaintiff as before.

A. It should be credited to bills discounted, on that day's journal.

Q. Is that all your answer?

A. Well, then it would be posted into the ledger.

Q. To what accounts in the ledger?

A. Bills discounted.

Q. Wouldn't it be debited anywhere in the books?

A. Why, it depends upon what it was paid in. If it was paid in currency, it was put in in cash.

Q. Will you produce the books showing the book-keeping transactions giving the record of the two payments that are endorsed on Exhibits "H" and "I" under date of May 9", 1887?

Objected to by the plaintiff on the same grounds as before.

Q. Before producing the books just asked for, you may state whether or not Exhibits "H" and "I" are all the claims that the National Exchange Bank of Tiffin claims to have against either Wiley Construction Company of S. L. Wiley, at or subsequent to April 26", 1884?

Objected to by plaintiff, on same grounds as before.

A. Well, that will require an examination again, too. I can not answer that question at once.

Q. Will you ascertain that fact and answer that question before we get the books which I have just demanded?

A. Nothing that I discover.

108 Q. Do you mean by your answer that so far as you are able to find Exhibits "H" and "I" evidence all claims that the bank claim- to have against either of those parties since April 26", 1884?

Objected to by plaintiff on same grounds.

A. All that I discover.

Q. Now, have you produced the entry in the book showing the two credits of May 9", 1887, that are endorsed on Exhibits "H" and "I"?

A. I have the entries here in the journal.

Q. Whereabouts in the journal does the entry appear?

A. Pages 416 and 417.

Q. Under what date is the entry on page 416?

A. May 9", 1887.

Q. On page 416 what is the meaning of that part of the entry "Ottumwa bonds"?

Objected to by plaintiff as before.

A. Those were bonds held as collateral by the bank.

Q. How di- you know that?

A. The bonds were sent to this bank as collateral. I mean, to the National Exchange bank, not to this bank.

Q. How do you know that, Mr. Chamberlain?

A. I know that by the letter accompanying it.

Q. Have you the letter?

A. I have, or the letter advising of sending them.

Q. Will you produce the letter?

A. Yes, sir.

Q. Are the letters which you have just produced signed, S. L. Wiley, dated January 18, and January 19, 1884, and marked Exhibit "J" and Exhibit "K" respectively, the letters in which the Ottumwa bonds which you have spoken about were sent to the bank?

109 Mr. LUTES: You are marking those as exhibits. You can't take any of those letters away. I want to state to counsel that none of these matters which have been identified as exhibits in this case,—the originals can not be attached to this deposition.

By McINTOSH: The plaintiff is willing. I take it, that certified copies of all exhibits identified may take the place of the originals and be returned with the deposition in their place?

By LUTES: Oh, yes, copies,—certainly.

Q. Mr. Chamberlain, did the National Exchange Bank of Tiffin, or the Tiffin national bank, on or prior to May 7", 1887, *b*old any other or additional bonds of the Ottumwa water works than those referred to in Mr. Wiley's two letters, Exhibits "J" and "K"?

A. Nothing else.

Q. Neither of the banks ever had anything to do with any of the Ottumwa water works bonds except the bonds referred to in Exhibits "J" and "K." Is that right?

A. That's right, as anything in the hands of the bank. The bank had no other bonds except the ones referred to in these letters as collatera-.

Q. How do you know that?

A. Why, I know from these letters; no other way.

Q. You mean Exhibits "J" and "K"?

A. Yes, sir; and the bonds were sent by express—didn't come with the letters; the letters came by mail.

Q. And do I understand you correctly, that from these letters you know that neither bank had any other bonds than those described in these two letters? 110

A. As collateral for the Wiley loan.

Q. Did they have any of those bonds for any other reason?

A. Well, not that I know of. Whether there were any other bonds—there are lots of special deposits in the bank,—they may have been in the bank, and I not know anything about them,—but these are all the bonds that I know of that the bank held as collateral for the Wiley loan as far as I can ascertain.

Q. Have you any other correspondence from Mr. Wiley relating to this indebtedness? If you have, produce it. Are there no letters from Mr. Wiley subsequent to October 13", 1885?

A. I don't think I discovered any. I have not been able to find any others, except the two dated April 11" and July 16", 1887.

Q. Now, Mr. Chamberlin, how was the cash received that formed the basis for the entries on pages 416 and 417 of the journal that you have produced under date of May 9", 1887?

A. It was received in a check issued by C. H. Venner & Company on the National Bank of the Republic, in Boston, in amount $11,500.00. That is to pay for the $23,000.00 of Ottumwa Hydraulic Power Company's bonds. $13,000.00 were held by the National Exchange bank, as collateral security, and $10,000.00 were held by John M. Naylor as security for a loan made by him individually. The $11,500 check, (there is the letter inclosing it, and a memorandum made at the time). Here is the express receipt for the bonds sent, marked "value $11,500.00." There is another letter in connection with it, from Mr. Wiley's attorney. 111

By LUTES: You had better go on and state while you are making that statement, how the bonds came to be sent there.

By WITNESS: Those bonds were sent to C. H. Venner & Company in pursuance of an arrangement made between Mr. Wylie's attorney and Mr. John M. Naylor.

The defendant moves to strike out all of the last answer of the witness, commencing with "Of these bonds $13,000 were held" down to the close of the answer, on the ground that the same is not responsive to the question.

Q. Do you know on what date the bonds the bank held as collateral to Exhibits "H" and "I" were sent to C. H. Venner & Co.? If so, state.

The plaintiff objects on the ground that it is incompetent, irrelevant and immaterial.

A. December 15, 1886.

Q. Did you write Venner & Co. a letter on the day you sent them said bonds?

Objected to by counsel for the plaintiff, on the same ground as stated before.

A. I suppose I did.

—. Will you produce your copy of that letter if you wrote one and kept a copy?

A. I am unable to produce the copy, because the letter book
112 has faded out. It was copied in a patent moist copying letter book, and that has since faded out so that it is impossible to read it.

Q. Were those bonds held as collateral for the payment of Exhibits "H" and "I" known as Ottumwa Hydraulic Power Company bonds?

A. They were.

By LUTES: You don't makey our answer definite. $13,000 of Ottumwa Hydraulic Power Company bonds were held as collateral for those notes.

Q. Were not all the bonds transferred to Venner & Co. and for which you say their check for $11,500 was received May 9", 1887, called Ottumwa Hydraulic Power Company bonds?

A. They were.

Q. What denomination were they, if you know?

A. I am not able to say now.

Q. What was the face value of all the bonds you sent to Venner & Company, December the 15", 1886?

By LUTES: Now, Mr. Chamberlain, in answering that question, make it definite whose bonds you sent.

A. $13,000 held by the National Exchange Bank and $10,000 held by John M. Naylor.

The defendant moves to strike out the answer excepting $13,000 and $10,000 as not responsive to the question and the conclusion of the witness.

Q. Whom was the check for $11,500 payable to that you received from Venner & Company for those bonds?

A. The National Exchange bank.

Q. At whose direction, if you know, was that check for $11,500 made payable to the National Exchange bank?

A. I cannot tell that.

Q. Who is John M. Naylor?

113 A. He was director of the National Exchange bank, and is now the president of the Tiffin national bank.

Q. How long has he been president of the Tiffin national bank?

A. Since January, 1892.

Q. Where is John M. Naylor now, if you know?

A. That's more than I can tell you. He is away on a trip, but

where he is located it is impossible for me to tell. He left no word here where I could reach him either by letter or telegram.

Q. When did he go away?

A. Well, that I don't know exactly. He was here on Saturday last. That was the last I saw of him, and on Monday I understood he was gone.

Q. When has Mr. John M. Naylor been away from Tiffin before this present week?

A. Well, I can not give dates, but he is away frequently for short times, and occasionally for long trips.

Q. When has he been away for five or six days that you, as cashier of the bank, couldn't tell where he was, before this present time?

A. Well, that would be impossible for me to say.

Q. Was he ever?

A. Oh, he has been away frequently that I didn't know where he was. I can not tell. He is always reticent about his business affairs himself, individually. He leaves no word here where we can reach him.

Q. Do you mean to say that he has ever been away for six days at a time without you, as cashier of the bank, having any information as to where he was?

114 Counsel for the plaintiff objects to all the foregoing questions and answers as incompetent, irrelevant and immaterial.

A. I think he has,—more than once.

Q. Can you give an instance.

Objected to by plaintiff, on same grounds as stated before.

A. No, I have kept no record of the date when he was away,—anything of that kind.

Q. As president of the bank does Mr. Naylor personally perform the duties ordinarily devolving upon the president of a bank?

Objected to by plaintiff, for the same reasons as before.

A. He performs the duties the president of this bank as the president, has done ever since I have been connected with the bank.

Q. Mr. Chamberlin, do you know Mr. Wiley personally?

A. I did when he was here.

Q. Did you ever receive a letter from him dated at Omaha?

A. I did.

Q. Have you such a letter?

A. I have.

Q. Is the paper you have produced, marked Exhibit "L" a letter you have received from him?

A. I supposed it to be from him,—signed by him.

The defendant offers in evidence Exhibit "L" the letter referred to, including the letter heading of the letter.

115 To which plaintiff objects on the ground that it is incompetent, irrelevant and immaterial.

Q. Mr. Chamberlain, does Mr. John M. Naylor, to your knowledge, know that National Exchange Bank, of Tiffin, Ohio, filed a petition based upon Exhibit "H" in the court of common pleas of Seneca county, on the 31" day of July, 1899, and on that date had a judgment entered up against the defendant in said suit?

Objected to by plaintiff as incompetent, irrelevant and immaterial.

A. I think he did.

Q. Will you produce all the letters you received from Venner & Company in connection with the sale of the Ottumwa Hydraulic Power Company bonds for which Venner & Company issued and sent to you its check for $11,500 payable to the National Exchange bank?

At this point the further taking of these depositions was adjourned to 1 o'clock, p. m., at the same place.

TIFFIN, OHIO, *February* 3, 1900—1 o'clock p. m.

The parties convened pursuant to the adjournment taken this morning, all parties being present, and the examination of the witness, John W. Chamberlain, was continued by Mr. McIntosh, as follows:

Q. Have you produced the letter received from Venner & Company in connection with this check of $11,500.00 and the bonds they sold, for which they sent that check?

A. I have.

116 Q. Are the two letters which you have just produced of date December 17", 1886, and marked Exhibit "M," and one December 18", 1886, and marked Exhibit "N," letters received in connection with the bond sale in question?

A. Yes, they are.

The defendant offers Exhibit "M" and Exhibit "N" in evidence.

To which plaintiff objects, on the ground that they are incompetent, irrelevant and immaterial.

Q. Now, have you looked for any other collateral as security for the payment of Exhibits "H" and "I"?

A. No, sir, I have not lately—at no time.

Q. Do you personally know whether there was any other collateral for a payment of those two notes?

A. None that I know of.

Q. Who was president of the National Exchange Bank of Tiffin when it went into liquidation?

A. John D. Loomis.

Q. When did John D. Loomis die?

A. Well, I will have to look at the records to get the exact date; just about the time Mr. Naylor was elected president, in 1892.

By Mr. LUTES: President of what?
By WITNESS: Tiffin national bank.

Q. Who of the officers of directors of the National Exchange Bank of Tiffin was the business done with between the bank and the Wiley Construction Company, if you know?

Objected to by the plaintiff on the ground that it is incompetent, irrelevant and immaterial.

117 A. It was done with the knowledge of all, but I think the actual business was transacted with me, as cashier, excepting the consultation with them in regard to the loan. In regard to the loan. In regard to the loan, you mean, or in regard to any other business.

Q. In regard to the business generally between the two.

A. There may have been some done with Mr. Naylor. I can not positively state now.

Q. Any with Mr. Loomis?

A. Why, he had a knowledge of the transaction. Whether there was any special business transacted with him, I am not able to tell.

By Mr. LUTES: Which Loomis do you mean?
By WITNESS: You understand me to refer to the president of the bank?

Q. Yes, John D. Loomis. What office if any did Mr. Naylor hold in the bank,—the National Exchange Bank of Tiffin, at the time it went into liquidation?

A. He was a director.

Q. Have you found the collateral register of the National Exchange bank, demanded in the subpœna that was served on you day before yesterday.

A. I had a very thorough search made last night, but was unable to find it.

Q. Have you found the envelope in which the collateral security for Exhibits "H" and "I" was kept?

Objected to by counsel for plaintiff, for same reasons as stated heretofore.

A. I have not.

118 Q. Have you found any trace of the collateral except the two letters from Mr. Wiley that were put in evidence as Exhibits "J" and "K"?

Objected to by counsel for the plaintiff for same reasons?

A. I have found nothing further.

Q. Do you know as a matter of your own knowledge whether or not there was other collateral as security for Exhibits "H" and "I" than the Ottumwa Hydraulic Power Company bonds?

Same objection by the plaintiff.

A. There was no other collateral than the $13,000 of Ottumwa Hydraulic bonds that I know of.

The defendant moves to strike out of the answer, "than the $13,000 of Ottumwa Hydraulic bonds" as not responsive to the question, and moves to strike out the whole answer as not responsive to the question.

Q. When will Mr. Naylor return to Tiffin, if you know?
A. I do not know.

By LUTES & LUTES, attorneys for plaintiff:

And thereupon the plaintiff moves to strike out each and every question and each and every answer thereto, together with all of the exhibits offered in evidence as a part of said deposition, on the ground that the same are incompetent, irrelevant and immaterial to prove any issue made in this case.

At this point the continuance of said cross-examination was adjourned to 8 o'clock, p. m., February 3", at the same place, the office of the Tiffin national bank.

119 OFFICE OF THE TIFFIN NATIONAL BANK,
8 o'clock p. m.

Pursuant to the recess taken this afternoon, all parties convened again at the hour of 8 o'clock p. m.: present the same parties as this afternoon.

And thereupon Mr. Lutes, of counsel for plaintiff, stated:

We have decided that we will not make any cross-examination.

JOHN W. CHAMBERLIN.

Subscribed in my presence and sworn to before me, this 3" day of February, A. D., 1900.

MARK L. LEISTER,
[SEAL.] *Notary Public, Seneca County, Ohio.*

* * * * * * *

120 EXHIBIT "A."

Articles of Association.

For the purpose of organizing an association to carry on
121 the business of banking, under the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864, the undersigned subscribers for the stock of said association.

First. The name and title of this association shall be "The National Exchange Bank of Tiffin."

Second. The place where its banking-house or office shall be lo-

cated, and its operations of discount and deposit carried on, and its general business conducted, shall be the city of Tiffin, county of Seneca, and State of Ohio.

Third. The board of directors shall consist of nine stockholders. The first meeting of the stockholders for the election of directors shall be held at the banking house of the association, on the first day of March, or at such other place and time as a majority of the undersigned stockholders may direct.

Fourth. The regular annual meetings of the stockholders for the election of directors, shall be held at the banking house of this association, on the second Tuesday of January of each year; but if no election shall be held on that day, it may be held on any other day, according to the provisions of the tenth section of the act; and all elections shall be held according to such regulations as may be prescribed by the board of directors, not inconsistent with the beforesaid provisions of the said tenth section of the act.

122 Fifth. The capital stock of this association shall be one hundred and twenty-five thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased according to the provisions of the thirteenth section of the act, to any sum not exceeding two hundred thousand ($200,000) dollars and in case of the increase of the capital of the association, each stockholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock, as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold his office (unless he shall become disqualified, or be sooner removed by a two-thirds vote of all the members of the board), for the term for which he was elected a director, and they shall have the power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and to continue them in office, or to dismiss them, as in the opinion of a majority of the board, the interests of the association may demand.

They shall also have power to define the duties of the officers and clerks of the association, to require bonds from them, and to

123 fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made; and generally to do and perform all the acts that it may be legal for a board of directors to do under the act aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient to make, under said act, for the management and administration of its affairs; which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any

stockholder who may be liable to this association, either as principle debtor, or otherwise, without the consent of the board.

Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements and provisions of the act.

Eighth. These articles of association may be changed or amended at any time by stockholders owning a majority of the stock of the association, in any manner not inconsistent with the provisions of the act; and the board of directors, or any three stockholders, may call a meeting of the stockholders for this purpose.

In witness whereof, we have hereto set our hands this first day of March, eighteen hundred and sixty-five.

124

SAM'L B. SNEATH.
JOHN H. PITTENGER.
ABEL RAWSON.
WILLIAM W. NAYLOR.
JOHN SWIGART.
JOHN D. LOOMIS.
HENRY A. BUSKIRK.
GILBERT M. OGDEN.
EDSON T. STICKNEY.
ROBERT SMITH.
ARIAL B. HOVEY.
JEREMIAH H. GOOD.
J. A. McFARLAND.
REZIN W. SHAWHAN.
ALFRED G. SNEATH.
J. M. NAYLOR.
LEVI DAVIS.

NOTE.—Article 3rd. Amended April 24/77, so as to read. The board of directors shall consist of five, or more, stockholders.

See page 76 Minute Journal No. 2.

EXHIBIT "B."

Organization Certificate.

TIFFIN, O., *M'ch 1st*/65.

We the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of organizing a banking association and transacting the business of banking, under the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and

provide for the circulation and redemption thereof," approved ne 3rd, 1864, do make and execute the following organization rtificate.

First. The name of this association shall be "The National Exchange Bank of Tiffin,"

Second. The said association shall be located in the city of Tiffin, county of Seneca, and State of Ohio, where the operaons of discount and deposit are to be carried on.

Third. The capital stock of this association shall be one hundred d twenty-five thousand ($125,000.00) dollars, and the same shall be vided into twelve hundred and fifty shares of one hundred dollars ch.

Fourth. The names and residence of each of the shareholders of is association, with the number of shares held by each are as llows:

Names.	Residence.	No. of shares.
ohn D. Loomis	Tiffin, Ohio	100
ezin W. Shawhan	" "	200
lfred G. Sneath	" "	200
ohn M. Naylor	" "	200
am'l B. Sneath	" "	50
Villiam W. Naylor	" "	50
Henry A. Buskirk	" "	50
Arial B. Hovey	" "	25
Abel Rawson	" "	25
eremiah H. Good	" "	20
Levi Gavis	" "	20
ohn A. McFarland	" "	10
ohn H. Pittinger	" "	50
Gilbert M. Ogden	Republic, Ohio	100
John Swigart	" "	10
Edson T. Stickney	" "	90
Robert Smith	Green Springs, Ohio	50

126 Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid act.

In witness whereof, we have hereunto set our hands, this first day of March, 1865.

LEVI DAVIS.
HENRY A. BUSKIRK.
SAM'L B. SNEATH.
JOHN H. PITTENGER.
ABEL RAWSON.
WILLIAM W. NAYLOR.
JOHN SWIGART.
JOHN D. LOOMIS.
REZIN W. SHAWHAN.
GILBERT M. OGDEN.
EDSON T. STICKNEY.
ROBERT SMITH.
ARIAL E. HOVEY.
JEREMIAH H. GOOD.
JOHN A. McFARLAND.
ALFRED G. SNEATH.
JOHN M. NAYLOR.

STATE OF OHIO, }
County of Seneca, } *ss:*

On the first day of March, 1865, before me a notary public of Seneca county, Ohio, personally came John D. Loomis, Rezin W. Shawhan, Alfred G. Sneath, John M. Naylor, Sam'l. B. Sneath, William N. Naylor, Henry A. Buskirk, Arial B. Hovey, Abel Rawson, Jeremiah H. Good, Levi Davis, John H. Pittenger, John A. McFarland, Gilbert M. Ogden, John Swigart, Edson T. Stickney and Robert Smith, to me well known who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office, the day and year aforesaid.

[SEAL.] NELSON L BREWER,
Notary Public.

127 EXHIBIT "C."

By-laws of National Exchange Bank of Tiffin.

TIFFIN, OHIO, *April 11th* / 65.

The board of directors of "the National Exchange Bank of Tiffin" met at the banking house, pursuant to special notice given therefor.

Present: John D. Loomis, prest., Rezin W. Shawhan, Robert Smith, Arial V. Hovey, John M. Naylor, Henry A. Buskirk, Abel Rawson and Edson T. Stickney, and, thereupon proceeded and adopted certain by-laws defining and regulating the business of said bank, as follows, to wit:

By-laws.

By-laws of "the National Exchange Bank of Tiffin, O.," organized under the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June 3, 1864.

Elections.

SEC. 1. The regular annual meetings of the stockholders' banking house on the second Tuesday of January of each year, between the hours of ten and four of said day, thirty days' notice of the time and object of which meeting shall be given by the cashier of this bank, by publication in the "Tiffin Tribune" and "Seneca Advertiser" of this city.

And it shall be the duty of the board of directors, within one month previous to the time of said election, to appoint three
128 ' stockholders to be judges of said election, who shall hold and conduct the same, and who shall after the election has been held, notify under their hands the cashier of this bank of the result thereof, and the names of the directors elect.

SEC. 2. The cashier upon receiving the returns of the judges of the election aforesaid, shall cause the same to be recorded upon the minute book of the bank, and shall notify the directors elect of their election, and of the time at which they are required to meet at the banking house of this bank for the purpose of organizing the new board.

If at the time fixed for the meeting of the directors elect, there should not be a quorum present, the members present may adjourn from time to time until a quorum is obtained.

SEC. 3. If, for any cause, the annual election of directors should not be held on the second Tuesday of January, the board shall order the election to be held on some other day, of which special election notice shall be given in accordance with the requirements and provisions of the 10th section of the act, and judges appointed, and returns made, and directors elect notified, according to the requirements and provisions of sections one and two of these by-laws.

Officers.

SECTION 4. The officers of this bank shall be a president, cashier, ass't cashier, teller, book-keeper, and such other officers as
129 may be from time to time required for the prompt and orderly transaction of its business.

SEC. 5. The president shall hold his office (unless he shall resign or become disqualified, or removed) for the current year for which the board of which he shall be a member was elected. In case a vacancy in the board of directors or in the office of president shall occur during any current year, it shall be filled by the board.

SEC. 6. The cashier and the subordinate officers shall be appointed to hold their offices, respectively, during the pleasure of the board,

SEC. 7. The cashier of this bank shall be responsible for all moneys, funds and valuables of the bank, and shall give bond, with security to be approved by the board in the penal sum of — dollars, conditioned for the faithful and honest discharge of his duties as such cashier, and that he will faithfully apply and account for all such moneys, funds, and valuables and deliver the same, on proper demand to the order of the board of directors of this bank, or to the person or persons authorized to receive them.

SEC. 8. The president of this bank shall be responsible for all such sums of money and property of every kind as may be entrusted to his care, or placed in his hands by the board of directors or by the cashier, or otherwise come into his hands as president and shall give bond in the penalty of — dollars with security to be approved by the board, conditioned for the faithful discharge of his duties,
130 as such president, and that he will faithfully apply and accoun*fo* for all sums of money and other property of the bank that may come into his hands as such president, and pay over, and deliver the same to the board of directors or to any other person or persons authorized to demand and receive the same.

SEC. 9. The teller shall be responsible for all such sums of money, property and funds of every description as may, from time to time be placed in his hands by the cashier or otherwise come into his possession as teller; and shall give bond with security to be approved by the board in the penalty of — dollars, conditioned for the honest and faithful discharge of his duties as teller, and that he will faithfully apply account for, and pay *on*, all moneys, property, and funds of every description that may come into his hands, by virtue of his office as teller to the order of the board of directors aforesaid, or to such person or persons as may be authorized to demand and receive the same.

Seal.

SEC. 10. The following is an impression of the seal adopted by the board of this bank. SEAL

Conveyance of real estate.

SEC. 11. All transfers and conveyances of real estate shall — by the bank, and under the seal thereof, in accordance with the orders of the board, and shall be signed by the president or cashier.

Increase of stock.

SEC. 12. Whenever an increase of stock shall be determined upon, in accordance with the provisions of the articles of association of this bank it shall be the duty of the board to notify all stockholders of the same, and to cause a subscription to be opened for such
131 increase of capital. In the increase of capital, each stockholder shall have the privilege of subscribing for such number of shares of the new stock, as he may be entitled to subscribe for, according to his existing stock in the bank. If any stockholder

should fail to subscribe for the amount of stock to which he may be entitled, the board of directors may determine what disposition shall be made of the privilege of subscribing for the unsubscribed stock.

Business of the bank.

SEC. 12. The bank shall be opened for business from 8 o'clock a. m. to 4 o'clock p. m. of each day of the year, excepting Sundays and days recognized by the laws of this State, as national and religious holidays. There shall be a standing committee, to be known as the exchange committee, consisting of the president, cashier, and one director, appointed by the board every six months, to continue to act until succeeded, who shall have power to discount and purchase bills, notes, and other evidences of debts, and to buy and sell bills of exchange, and who shall, at each regular meeting of the board, make a report of the bills and notes discounted and purchased by them since their last previous report.

Minutes.

SEC. 14. The articles of association of this bank and the returns of the judges of the elections, shall be recorded in the minute-book, in which shall also be recorded the proceedings of the board, at all regular and special sessions. The minutes of each meeting shall be signed by the president and attested by the cashier.

132

Transfers of stock.

SEC. 15. The stock of this bank shall be assignable only on the books of this bank, subject to the restrictions and provisions of the act; and a transfer book shall be kept, in which all assignments and transfers of stock shall be made. No transfer of stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association either as principal debtor or otherwise; and certificates of stock shall contain upon them notice of this provision. Transfers of stock shall not be suspended preparatory to a declaration of dividends; and, except in cases of agreements, dividends shall be paid to the stockholder in whose name the stock shall stand on the day on which the dividends are declared.

SEC. 16. Certificates of stock signed by the president and cashier, may be issued to stockholders, and the certificate shall state upon the face thereof that the stock is transferrable only upon the books of the bank; and when stock is transferred, the certificates thereof shall be returned to the bank and cancelled, and new certificates issued.

Expenses.

All current expenses of the bank shall be paid by the cashier, who shall every six months, or oftener, if required to do so, make to the board a detailed statement thereof.

Contracts.

SEC. 17. All contracts, checks, drafts, &c., and all receipts for circulating notes, received from the Comptroller of the Currency, shall be signed by the president or cashier.

133 Examinations.

SEC. 18. There shall be appointed by the board every three months a committee whose duty it shall be to examine into the affairs of the bank, to count its cash, and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and the condition of the bank correspondents therewith, and whether or not the bank is in sound and solvent condition, the result of which examination shall be reported to the board at their next regular meeting.

Meetings.

SEC. 19. The regular meetings of the board shall be held on Tuesdays of each week. Special meetings may be called by the president or cashier.

Quorums.

SEC. 20. A majority of the directors including the president shall be a quorum to do business.

SEC. 21. These by-laws may be changed or amended by the vote of two-thirds of the directors.

Amendments.

Sec. 1. of these by-laws amended (Nov. 28/65) so as to read as follows, The cashier of this bank shall notify each stockholder 15 days before annual elections, of the time and object of such election.

SEC. 22. The assistant cashier shall give bond with security to be approved by the board in the penal sum of $— conditioned for the faithful and honest discharge of his duties as such assistant
134 cashier, and that he will faithfully apply and account for all such moneys funds and valuables as may come into his hands by virtue of his office, and deliver the same on proper demand to the order of the board of directors of this bank, or to the person or persons authorized to receive the same, and in case of the resignation or death of the cashier, or that the office of cashier should otherwise become vacant, it shall be the duty of the assistant cashier to perform all the duties of cashier, until a cashier is duly appointed and qualified, and said assistant cashier shall be responsible in like manner, as the cashier is made responsible by the by-laws of this bank.

Section 13. Jan'y 18/70, to read as follows, The exchange committee shall consist of the president, cashier, and two directors appointed by the board at the time of its organization each year.

Section 1. Amended December 20th, 1870, so as to read as follows:

The regular annual meetings of the stockholders of this bank, for

the election of directors, shall be held at its banking-house on the second Tuesday of January of each year between the hours of 12 o'clock m. and 2 o'clock p. m. of said day.

EXHIBIT "D."

Certificate of Authority.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF CURRENCY,
WASHINGTON, *M'ch* 17/65.

135 Whereas by satisfactory evidence presented to the undersigned, it has been made to appear that "the National Exchange Bank of Tiffin, in the city of Tiffin, in the county of Seneca, and State of Ohio, has been duly organized under and according to the requirements of the act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and has complied with all the provisions of said act required to be complied with before commencing the business of banking under said act.

The office of Comptroller of the Currency being vacant, now, therefore, I. Samuel T. Howard, Deputey Comptroller of the Currency do hereby certify that "the National Exchange Bank of Tiffin in the city of Tiffin in the county of Seneca and State of Ohio, is authorized to commence the business of banking under the act aforesaid.

In testimony whereof, witness my hand and seal of office this seventeenth day of March, 1865.

(Signed) SAMUEL T. HOWARD,
Deputy Comptroller of Currency.

EXHIBIT "E."

Records of Meetings of Directors.

TUESDAY, *Feb.* 24, 1885—4 p. m.

Regular meeting of the board.

Members present, J. D. Loomis, R. W. Shawhan, J. M. Naylor, A. Buskirk and G. D. Loomis.

Minutes of last meeting read and approved.

Discounts and business paper taken since last meeting were
136 then examined and approved.

Whereas the corporate existence of this bank expires by limitation March 1st. and will be succeeded by the Tiffin national bank,

On motion the full board of directors of this bank were appointed

to confer with a like committee from the Tiffin national bank, and agree upon a value to be placed on the transferrable assets of this bank, including bank building and U. S. bonds to be sold to Tiffin national bank.

Board then adjourned.

JNO. D. LOOMIS, *Pres't.*

Attest: J. W. CHAMBERLIN, *Cas.*

TIFFIN, OHIO, *M'ch* 2/1885.

Special meeting of the board.

Members present: J. D. Loomis, R. W. Shawhan, J. M. Naylor, A. Buskirk and G. D. Loomis.

The committee appointed at the last regular meeting, presented the following:

Report.

To the directors of the National Exchange Bank of Tiffin, Ohio:

The committee appointed by you to confer with a like committee appointed by the board of directors of the Tiffin national bank, and determine a value to be placed on the assets of the National Exchange bank, to be transferred to the Tiffin national bank beg leave to report that they have fixed upon the following valuation:

Net worth of discounts as per schedule		$160,871.38
137 U. S. 4 % bonds in Washington with U. S. Treasurer	$50,000	
Premium on same including interest due Ap'l 1, 1885—22 %	11,000	
		61,000.00
U. S. bonds in New York in bank	950	
Premium on same—22 %	209	
		1,159.00
Tiffin City bonds		22,500.00
Tiffin board of education bonds		18,000.00
5 % fund deposit with U. S. Treasurer		2,250.00
Wood County bonds	2,500.00	
Interest due M'ch 1, 1885, on same	80.00	
		2,580.00
Forward		$168,360.38
Paulding County school bonds	800.00	
Interest on same to M'ch 1, 1885	123.20	
		923.20
46 shares Tiffin Ag'l W'ks stock—par value	2,300.00	2,150.00
Banking house including furniture and fixtures		17,000.00

Cash Items.

U. S. notes	$20,400.00	
Checks & remittances	29,176.14	
Bills of other banks	1,410.60	
Gold coin	3,197.40	
Silver "	3,595.99	
Coppers & nickels	420.00	
		58,200.13
		$346,533.71

Respectfully submitted.

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R. W. SHAWHAN,
J. M. NAYLOR,
JOHN D. LOOMIS,
A. BUSKIRK,
GEO. D. LOOMIS,
Committee.

Tiffin, O., M'ch 2, 1885.

On motion the report of the committee was received, and the valuation of assets adopted by this board, and the cashier directed to execute a warranty deed for the bank building, to the Tiffin national bank and deliver the same, together with all the other assets described in the above report to the said Tiffin national bank.

Board then adjourned.

JNO. D. LOOMIS, *Pres't.*

Attest: J. W. CHAMBERLAIN, *Cas.*

TUESDAY, *March* 3, 1885—4 p. m.

Regular meeting of the board.

Members present: John D. Loomis, R. W. Shawhan, J. M. Naylor, Geo. D. Loomis.

Discounts and business paper taken since last meeting and up to close of business Saturday Feb. 28, 1885, were then examined and approved.

Minutes of last regular and intervening special meetings were read and approved.

The corporate existence of this bank having expired at the close of business February 28, 1885, by limitation, it then went int*l* liquidation, the available assets having been transferred to the Tiffin national bank.

139 Board then adjourned.

JNO. D. LOOMIS, *Pres't.*

Attest: J. W. CHAMBERLAIN, *Cas.*

140 EXHIBIT "F."

When offered.	No.	For whom discounted.	Endorser.	Drawn.	Accepter.	When payable.	Date.	Time.	When due.	Days.	Amount.
Ap'l 26	45170	Wiley Construction Co.	S. L. Wiley.	Wiley Construction Co.	.....	.....	Ap'l 26	.....	Oct. 1/84	R.	10,000
	45171	Wiley Construction Co.	S. L. Wiley.	Wiley Construction Co.	.....	.....	"	.....	Oct. 1/84	.....	609.78

141 EXHIBIT "G."

When offered.	No.	For whom discounted.	Endorser.	Drawn.	Accepter.	When payable.	Date.	Time.	When due.	Days.	Amount.
1883. Dec. 1	44070	Wiley Construction Co.	S. L. Wiley.	Wiley Construction Co.	.....	.....	Nov. 21	1 m.	Dec. 24	R.	3,000
	44071	"	"	"	.....	.....	" 30	1 m.	Jan. 2	R.	7,000

142 EXHIBIT "H."

$10,000.00. TIFFIN, OHIO, *Ap'l* 26, 1884.

October 1st 1884 after date, for value received, we jointly or sev erally promise to pay the National Exchange bank, or order, at its office in Tiffin, Ohio, ten thousand dollars, with 8 per cent. interest after maturity.

And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and serving of process, and confess a judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and writs of errors, and waive all right to appeal, second trial and stay of execution in our behalf, or in behalf of either of us.

WILEY CONSTRUCTION CO. [SEAL.]
S. L. WILEY, *Pres't.* [SEAL.]
S. L. WILEY. [SEAL.]

P. O. Greenfield, Mass.
Due Oct. 1st.
Endorsed on back of note:
45170 May 9—1887 paid on the within $6311.75.

143 EXHIBIT "I."

$609.78. TIFFIN, OHIO, *Ap'l* 26, 1884.

October 1st 1884 after date, for value received, we jointly and severally promise to pay the National Exchange bank, or order, at its office in Tiffin, Ohio, six hundred & nine & 78/100 dollars.

With 8 per cen-. interest after maturity.

And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and serving of process, and confess a judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and writs of errors, and waive all right to appeal, second trial and stay of execution in our behalf, or in behalf of either of us.

WILEY CONSTRUCTION CO. [SEAL.]
S. L. WILEY, *Pres't.* [SEAL.]
S. L. WILEY. [SEAL.]

P. O. Greenfield.
Due Oct. 1.

Endorsed on back of note: 45171 Paid—Oct.—13/84—$455. May 9—1887 Paid in full $188.25.

144 EXHIBIT "J."

The Wiley Construction Company—S. L. Wiley, pres't.

GREENFIELD, MASS., *Jan.* 18, 1884.

Exchange National Bank, Tiffin, Ohio.

GENTLEMEN: We have this day sent you by exp. $12,000. Ottumwa Hydraulic bonds which are to be as collateral for the notes you now hold against us. We cannot as yet see our way clear about the time of payment but hope that we can definitely set a time. We will come to see you very soon.

Very truly, S. L. WILEY.

145 EXHIBIT "K."

The Wiley Construction Company—S. L. Wiley, pres't.

GREENFILD, MASS., *Jan. 19th*, 1884.

Exchange Nat. Bank.

GENTLEMEN: We sent you 13 bonds instead of 12 as formerly stated making what the writer told you 75 to 80c. on a dollar. Please acknowledge receipt of same. We sent the bonds as $10,000. value as the Co. would carry them as safely as if put at face value.

Yours truly, S. L. WILEY.

146 EXHIBIT "L."

W. A. Underwood, president; W. H. Hall, vice president; S. L. Wiley, sec. & treas.; A. B. Hunt, superintendent.

City Water Works Company.

OMAHA, NEBRASKA, *April* 11", 1887.

J. W. Chamberlain, cashier.

DEAR SIR: Your favor is received. I will pay Mr. Robbins of Hartford his bill and have so written him to day. Will also send you draft for $25. soon.

Yours truly, S. L. WILEY, *M.*

147 EXHIBIT "M."

Banking house of C. H. Venner & Company, Tremont Bank building.

BOSTON, *Dec. 17th*, 1886.

J. W. Chamberlin, Esq., cashier, Tiffin, Ohio.

DEAR SIR: Your favor of the 15th instant is received and contents noted. You will comply with the requests contained therein.

Up to the present writing the bonds have not been received, probably will be tomorrow morning. On receipt will acknowledge the same.

Yours truly,

C. H. VENNER CO.,
By E. C. STANWOOD, *Att'y.*

148-150 EXHIBIT "N."

C. H. Venner & Company, bankers, 8 to 16 Congress street, Tremont Bank building.

BOSTON, *Dec.* 18", 1886.

J. W. Chamberlin, Esq., Tiffin, Ohio.

DEAR SIR: We received today by express the $23,000 Ottumwa Hydraulic Power Co. bonds, as specified in your favor of the 15" inst.

The package was marked "From Nat'l Ex. bank" which we suppose to be an error.

Yours truly,

C. H. VENNER CO., *S.*

151 Q. State your name, age, place of residence, and occupation?

A. John W. Chamberlin; 62; Tiffin, Ohio, cashier of Tiffin national bank.

What is the book that you have produced, and now have in your hand?

A. The minute-book, number one (1), from the National Exchange bank.

Q. When the National Exchange Bank of Tiffin went into liquidation, who was given if you know, the custody of its records, books and papers?

Counsel for plaintiff objects as before, on the ground that the question is immaterial, irrelevant and incompetent, overruled, plaintiff excepts.

A. Why, the books and papers were left in the vault of the Tiffin national bank.

Q. And as cashier of the Tiffin national bank, you have had in your custody in the vault of the Tiffin national bank, the records of the National Exchange bank from the time it went into liquidation, have you?

Counsel for plaintiff objects to the question on the ground that it is immaterial, incompetent, and irrelevant and at this time, the plaintiff further objects that all of the testimony is not being offered or read by counsel but simply picking out a question here and there of the witness'es testimony, overruled, plaintiff excepts.

A. I won't say that they were in my custody, but in the custody of the Tiffin national bank.

Q. And you have been its cashier ever since its organiza-
152 tion in 1885, is that true?

A. Yes sir.

Q. Have you before you the record of the meeting of the stockholders and directors, or of either of them, pursuant to the going into liquidation of the National Exchange Bank of Tiffin? If so, turn to the record.

Objected to as incompetent, immaterial and irrelevant. Overruled, plaintiff excepts.

A. I have the record of the directors' meetings.

Q. Where do they appear on the record which you have before you?

A. Commencing on page 302.

Q. Commencing on page 302, is the book that you have before you the regular record of the directors' meetings, as they were held consecutively of the National Exchange Bank of Tiffin?

A. Yes sir.

The defendant offers in evidence the records of the meetings of the directors in said National Exchange Bank of Tiffin produced and identified by the witness, commencing at page 302, of the record before the witness, with the meeting of Tuesday, February 24, 1885, including also the meeting of March 2, on pages 303 and 304 and the meeting of March 3, 1885, commencing at the top of page 305, and concluding with the words "John W. Chamberlin, cashier, one or two lines below the middle of page 305, the records of said meetings being identified as Exhibit "E," a copy of which record is hereto attached.

To all of which the plaintiff objects on the ground that it is incompetent, irrelevant, and immaterial, overruled, plaintiff excepts.

153 After reading Exhibit "E" by defendant now plaintiff moves to strike from the record Exhibit "E" as read by the counsel for the reason that the same is incompetent, irrelevant and immaterial, and not within the issues of this case, overruled plaintiff excepts.

Q. Mr. Chamberlin, can you produce the discount ledger of the National Exchange Bank of Tiffin, for April 1884, also the collateral ledger of the bank for the same time?

A. We have no books known by those names.

Q. How, in your method of book-keeping, in April, 1884, did you keep account of collateral received as security for paper the bank discounted, or security for loans?

Objected to by counsel for plaintiff for the same reason as before, incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

A. At the time we made very few collateral and the record of them, when we made a loan on collateral, we placed it in an envel-

ope with the name endorsed on the outside, of the party depositing it, the description of the collateral, date when deposited, and what it was security for, and we kept those in a separate box,—a collateral box.

Q. When you made a loan, what record on the books of the bank did you make to keep a book account of the loan?

A. We have what was called a discount ledger, which I suppose is the same that you refer to.

Q. Will you produce the discount ledger for April, 1884, of the National Exchange Bank of Tiffin?

A. Yes, sir.

154 Q. Have you before you the discount ledger for April, 1884, of the National Exchange Bank of Tiffin?

A. Yes sir.

Q. Examine that ledger, and see if there is any record of a loan to the Wiley Construction Company, under date of April 26, 1884?

To this and the preceeding questions and answers, counsel for plaintiff objects on the ground that they are incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

Q. Do you find any such entry?

A. Yes, sir.

Q. Where is it on the discount ledger that you produce?

Objected to as incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

A. Page 147, number 45170, and 45171.

The defendant now offers in evidence Exhibit "F," the record from the discount ledger of said bank, produced by the witness, on page 147, consisting of the headings of each column, including dates at the heads of the column and the two lines numbered 45170 and 45171.

To which the counsel for plaintiff objects on the ground that it is incompetent, irrelevant and immaterial, sustained, defendant excepts.

A. There was not.

Q Mr. Chamberlin, I notice on the back of Exhibit "H" an endorsement as follows: "May 9, 1887. Paid on the within $6,311.75." Look at that endorsement and state whose hand writing that endorsement is in, if you know.

155 Objected to by counsel for plaintiff as incompetent, irrelevant and immaterial and for the further reason that Exhibit "H" has not been received in evidence, overruled. plaintiff excepts.

The defendant, for the purpose of making the record clear, offers in evidence Exhibit "H," attached to Mr. Chamberlin's deposition.

Objected to as incompetent, immaterial and irrelevant, overruled, plaintiff excepts.

Mr. McIntosh: I now renew the offer of the question just read.

Objected to as incompetent, immaterial and irrelevant, overruled, plaintiff excepts.

A. It is in my hand writing.

Q. According to the method of keeping the books at the time these two endorsements of May 9, were made, where would the money received, which was noted in those endorsements be upon the books?

Objected to by plaintiff, as incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

A. Well, it would appear in the business transactions of that day.
Q. Name the books and entries where it would appear?
A. It should be credited to bills discounted, on that day's journal.
Q. Is that all of your answer?
A. Well, then it would be posted into the ledger.
Q. To what account in the ledger?
A. Bills discounted.
Q. Wouldn't it be debited anywhere in the books?
156 A. Why it depends upon what it was paid in. If it was paid in currency, it was put in in cash.

Solon L. Wiley, sworn for the defendant examined in chief by Mr. McIntosh, testified as follows:

Q. You are the defendant in this suit?
A. Yes, sir.
Q. Where do you reside?
A. Omaha, Neb.
Q. Where have you resided since July 1st, 1899?
A. Omaha.
Q. In the State of Nebraska?
A. Yes, sir.
Q. Have you at any time since July 1st, 1899, been in Seneca county, Ohio?

Objected to as incompetent, immaterial and no contention that he was there, sustained, defendant excepts.

The defendant offers to show that he was not. Offer refused, defendant excepts.

Q. Have you at any time since July 1st, 1899, been within the State of Ohio?

Objected to as immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "No, sir." Offer refused, defendant excepts.

Q. Were you ever served with any papers, in the suit that purports to have been brought in Seneca county, Ohio, in which the National Exchange Bank of Tiffin, Ohio, was plaintiff, and the Wiley Construction Company, and S. L. Wiley were defendants?

157 Objected to as immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "No, sir." Offer refused, defendant excepts.

Q. Have you any personal acquaintance, with, or have you ever had any connection with one John Painter, who it is claimed, was, on the 31 of July, 1899, an attorney at law of the court of common pleas, for Seneca county, Ohio?

Objected to as immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "No." The offer is refused, defendant excepts.

Q. Did you have any knowledge or notice, prior to the 7" day of August, 1899, the date of the commencement of this suit in this court, that the National Exchange Bank of Tiffin, Ohio, as plaintiff, had brought suit against the Wiley Construction Co., and S. L. Wiley as defendants, in the court of common pleas for Seneca county, Ohio, on the 31" day of July, 1899.

Objected to as immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "No." The offer is refused, defendant excepts.

Mr. McINTOSH: I demand of the plaintiff to produce note described in Exhibit 1.

Mr. BOUCHER: We have not it.

Mr. McINTOSH:

Q. Examine Exhibit "H," which is attached to the deposition of Mr. Chamberlin, which has been read from, and on behalf of the defendant, and state whether or not you are acquainted with the Wiley Construction Co., whose name purports to be signed to that note?

Objected to as incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

158 A. Yes, sir.

Q. What was the Wiley Construction Co., was it a corporation, or, was it a partnership?

Objected to as not the best evidence, incompetent, irrelevant, and immaterial, sustained, defendant excepts.

Q. Did you sign your name to a note, of which that is a copy?

Objected to as incompetent, immaterial and irrelevant, and no issue raised in the pleadings as to his having signed such a note, sustained, defendant excepts.

The defendant offers to prove tha- the answer to the question would be "I did." Offer refused, defendant excepts.

Q. What relation do you bear to the note of which the exhibit you have before you is a copy, that is, were you a principal maker of the note, or, were you merely a surety?

Objected to as calling for a conclusion of the witness, incompetent, irrelevant, and immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "I was surety." Offered refused, defendant excepts.

Q. Did you ever receive personally, any part of the consideration for the note, a copy of which is Exhibit "H," you now have in your hand?

Objected to as incompetent, immaterial and irrelevant, sustained, defendant excepts.

The defendant offers to show that the answer to the question would be "No." The offer is refused, defendant excepts.

Q. You may state to the jurty whether or not you ever had any conversation with the officers of the National Exchange bank
159 about bring- a suit on the original note of which Exhibit "H," that you have before you, is a copy?

Objected to as incompetent, irrelevant, and immaterial, sustained, defendant excepts.

The defendant offers to show that the answer would be "I did." Offer refused, defendant excepts.

Q. You may state when, and where that conversation was?

A. Objected to as incompetent, immaterial and irrelevant, sustained, defendant excepts.

The defendant offers to show that the answer would be "In the month or November, 1885, at Tiffin, Ohio." The offer is refused, defendant excepts.

Q. What officers of the National Exchange bank was that conversation with?

Objected to as immaterial, incompetent, irrelevant, sustained, defendant excepts.

The COURT: That may be getting to a point that is bearing on that I am going to let you in, that is, whether or not the plaintiff in the suit in Ohio, was the holder of the note, when judgment was rendered. Of course, if this is for the purpose of showing a talk, it is proper, if it is not it is inadmissible in my view of the case.

Mr. MCINTOSH: The purpose of the evidence I am just now offering is this. It is to show that in a conversation with the officers of the Tiffin national bank, in November, 1885, they agreed with Mr. Wiley, that if he would pay the cost of maintaining the suit on this note in Connecticut that in consideration of that, and in the further consideration of the fact that he had deposited with them as collateral security for this note the Ottumwa water works bond
160 of the par value of thirteen thousand ($13,000) dollars that they would release him from any further liability on the note. It is for the purpose of showing the situation of these as to Wiley. The court sustained, defendant excepts.

The plaintiff offers to prove by the witness Wiley, that in the fall

of 1885, an agreement was entered into between Mr. Wiley, and the owners of this note, that after Wiley would pay the cost of maintaining a suit on this note against the Wiley Construction Co. in the State of Connecticut and would further assign thirteen-thousand ($13,000) dollars, of par value of Ottumwa water works bond, and the application of the proceeds of the sale of said bond to the payment of said note, that they would release Wiley from any further liability on this note, That Wiley accepted the terms of this agreement That the suit in Connecticut was commenced and pursuant to judgment, and that he paid the cost of maintaining said suit, that his Ottumwa water works bonds were sold and the proceeds of the sale thereof applied upon this note. The offer is refused, defendant excepts.

The paper is marked Exhibit 2, there being no Defendant's Exhibit 1.

Q. Examine this transcript, Defendant's Exhibit 2, and state whether or not the note in controversy in that suit was the same note as that of which Exhibit " H " is a copy.

Objected to as incompetent, irrelevant and immaterial, and no testimony that it is any transcript or any note in a transcript, sustained, defendant excepts.

The defendant offers to show that the answer would be " No sir." Offer refused, defendant excepts.

The defendant now offers in evidence the transcript, De-
161 fendant's Exhibit 2, showing that in 1888, a judgment was rendered in Connecticut against the bank, on this note, that is against the plaintiff.

Objected to as irrelevant, incompetent, immaterial and not tending to prove any issues of this case, sustained, defendant excepts.

Q. Did you know whether or not both the officers of the Tiffin national bank and the National Exchange bank knew where you were to be found at all times since the 1st of October, 1884?

Objected to as incompetent, immaterial, irrelevant, sustained, defendant excepts.

The defendant offers to show by the witness that the officers of said bank at all times since October 1st, 1884, knew where Mr. Wiley resided. Offer refused, defendant excepts.

The cross-examination of this witness is waived.

With this the plaintiff rests.

Adjourned until tomorrow at 9:30 o'clock.

OMAHA, NEB., *Feb.* 27, 1901.

The plaintiff moves to strike from the record Exhibit " E " attached to the deposition of Mr. Chamberlin, the same having been offered by the defendant and received, the objection being taken of the same, incompetent, irrelevant and immaterial, overruled, plaintiff excepts.

The plaintiff reads from the deposition of John W. Chamberlin that part on page 15, under date February 3, 1900, question in chief, by Mr. McIntosh.

Q. Now, Mr. Chamberlin, if you want to make any corrections, as you say you do, you can proceed with your corrections.

A. It was in regard to the question as to who had control
162 of the books and papers of the National Exchange bank. The president and cashier and directors of the National Exchange bank at the time it went into liquidation became the same officers in the Tiffin national bank, and the books and papers of the National Exchange bank remained in the vault and office room of the Tiffin national bank under the direction of the board of directors of the National Exchange bank, and were subject to their control.

By Mr. LUTES: And still are.

By WITNESS: And still are.

Plaintiff offers the following questions and answers found on page 18 of the deposition, as follows:

Q. On page 16 what is the meaning of that part of the entry Ottumwa bonds?

Objected to as not rebuttal, overruled, defendant excepts.

A. Those were bonds held as collateral, by the bank.

Q. How do you know?

A. The bonds were sent to this bank as collateral. I mean to the National Exchange bank, not this bank.

Q. How do you know that Mr. Chamberlin?

A. I know that by the letter accompanying it.

Q. Have you the letter?

A. I have, or the letter advising of sending them.

Q. Will you produce the letter?

A. Yes, sir.

The plaintiff reads from page 22 of the same deposition the following questions and answers.

Q. Who has a check for $11,500. payable to that you received from Venner & Co. for those bonds?

Objected to as not rebuttal, and not the best evidence and
163 immaterial, overruled, defendant excepts.

A. To the National Exchange bank.

The plaintiff offers in evidence Exhibit "L," identified by the witness as a letter received by the plaintiff company from Mr. Wiley on April 11", 1897, Received without objection, and a copy is hereto attached marked Exhibit "L."

The plaintiff moves the court to direct a verdict for the plaintiff for the full amount of plaintiff's claim, for the reason that the defendant has wholly failed to prove a defense to the cause of action, of the plaintiff, overruled, plaintiff excepts.

EXHIBIT L.

Pleas before the Hon. J. W. Schaufelberger, presiding judge of the court of common pleas within and for the county of Seneca and State of Ohio, begun and held at the court house in the city of Tiffin the 1″ *the* day of May, A. D. 1899.

Be it remembered, that on the 31″ day of July, 1899, a petition and answer were filed with the clerk of this court which reads as follows, to-wit:

THE STATE OF OHIO, } *ss:*
Seneca County, }

Court of Common Pleas.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, }
vs. } Petition.
WILEY CONSTRUCTION COMPANY and S. L. WILEY, Defendants. }

The plaintiff is a body corporated duly organized under
164 the laws of the United States relating to organization and regulation of national banks and known as the national bank act. Its certificate of authority expired on the 17″ day of March, 1885, but it is still lawfully exercising its franchise for the purpose of liquidating its affairs. The Wiley Construction Company is a corporation duly organized under the laws of the State of Massachusetts.

The defendants, on the 26″ day of April, A. D., 1884, executed and delivered to the plaintiff, National Exchange Bank of Tiffin, Ohio, their promissory note of that date, with the warrant of attorney annexed, true copies of which warrant and note, with all indorsements thereon, are hereto attached, marked, Exhibit "A" and made a part of this petition.

Said note is unpaid, except as shown by said indorsements, and there is now due the plaintiff on said note the sum of five thousand, seven hundred and seventy-two dollars and seventy cents, with interest at the rate of 8 per cent. per annum, from the 9″ day of May, A. D., 1887.

Wherefore plaintiff prays judgment against said defendants for the sum of five thousand seven hundred and seventy-two dollars and seventy cents, with interest thereon from the 9″ day of May, A. D., 1887, at the rate of 8 per cent. per annum till paid, and for costs of suit.

LUTES & LUTES,
Attorneys for Plaintiff.

STATE OF OHIO, *Seneca County,* } ss:

Nelson B. Lutes, being sworn, says that he is one of the attorneys of said plaintiff, that this action is brought upon an instrument in writing for the unconditional payment of money only, that
165 said instrument in writing is in his possession, and that he verily believes the statements contained in the foregoing petition are true, in substance and in fact.

NELSON B. LUTES.

Sworn to by said Nelson B. Lutes before me, and by him signed in my presence this 27″ day of July, A. D. 1899.

F. R. MANN,
Deputy Clerk.

[SEAL.]

"EXHIBIT A."

$10,000.00. TIFFIN, OHIO, *Ap'l* 26, 1884.

October 1″, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange bank, or order, at its office in Tiffin, Ohio, ten thousand dollars with 8 per cent. interest after maturity. And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, in favor of the holder of this instrument for the amount then appearing due together with the cost of suit, and thereupon to release all errors, and writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us.

Second trial.

WILEY CONSTRUCTION CO. [SEAL.]
S. L. WILEY, *Pres't.* [SEAL.]
S. L. WILEY. [SEAL.]

P. O., Greenfield, Mass.
Due, Oct. 1″.
Said note is indorsed on back as follows:
45170 May 9″, 1887. Paid on the within $6311.75.

166 Court of Common Pleas.

STATE OF OHIO, } ss:
Seneca County, }

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
WILEY CONSTRUCTION COMPANY and S. L. WILEY, Defendants. } Answer.

By virtue of the warrant of attorney annexed to and mentioned in the foregoing petition, I an attorney at law, in the several courts of record in this State do hereby enter an appearance for said defendants in this suit and waive the issuing and service of process therein, and confess a judgment in favor of said plaintiff, against said defendants, on said note for the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount appearing due for principal and interest on said note, and also for costs of suit, taxed and to be taxed; and I do hereby release and waive all exceptions, errors and right of appeal in the premises.

JOHN BENDER,
Att'y for Def't.

And afterward, to-wit: on the 21" day of July, 1899, an entry was made on the journal of this court which reads as follows, to-wit:

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff,
vs.
WILEY CONSTRUCTION COMPANY and S. L. WILEY, Defendants. } Cognovit.

167 This day came the plaintiff by its attorneys; also appeared in open court, John Bender, an attorney at law of this court, and by virtue of the warrant of attorney annexed to the note, attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said note against said defendants, and in favor of said plaintiff for eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of principal and interest due on said note, and for the costs taxed and to be taxed and released and waived all exceptions, errors and right of appeal in the premises.

It is, therefore, considered that said plaintiff recover of said defendants the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of said note with interest computed at 8 per cent. per annum, from the 9" day of May, A. D., 1887, and also its costs herein expended taxed at $6.50.

Certificate to Copies.

Revised Statutes of the United States, sec. 905.

THE STATE OF OHIO, } ss:
Seneca County, }

I, I. N. Rex, clerk of the court of common, pleas, within and for said county, having the custody of the files, journals, and records of said court, hereby certify that the foregoing is a true copy of the petition, exhibit, answer, and journal entry as the same appear upon the records of said court, and I further certify that I
168 have carefully compared said foregoing copy with the original record, and that the same is a full and correct transcript thereof,

Witness my hand and the seal of said court at Tiffin, this 5″ day of Aug. A. D., 1899.

[SEAL.] I. N. REX, *Clerk.*

I, J. W. Schaufelberger, one of the judges of the court of common pleas, within and for the tenth judicial district of the State of Ohio, which district includes the county of Seneca, do hereby certify that said I. N. Rex, was, at the date of the above certificate, and now is clerk of said court of common pleas, within and for said county of Seneca, and State of Ohio, and that said clerk is the officer in whose custody said original record is required by the laws of the State of Ohio, to be kept, and is authorized by the laws of said State to certify as aforesaid, and that said attestation and certificate are in due form of law.

Signed by me and dated at Tiffin, Ohio, Seneca county, Ohio, this 5″ day of Aug. A. D., 1899.

J. W. SCHAUFELBERGER,
Judge as Aforesaid.

THE STATE OF OHIO, } ss:
Seneca County, }

I, I. N. Rex, clerk of the court of common pleas, within and for the county and State aforesaid, hereby certify that Hon. J. W. Schaufelberger is one of the judges of the court of common pleas, within and for the tenth judicial district of the State of Ohio, which district includes the county of Seneca, duly commissioned and qualified, and now acting as such.

169 Witness my hand and the seal of said court at Tiffin, Ohio, this 5″ day of Aug. A. D., 1899.

[SEAL.] I. N. REX, *Clerk.*

In the District Court of Douglas County, Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff, *vs.* SOLON L. WILEY, Defendant. } Doc. 69. No. 161.

With this the testimony closed, no other or additional evidence being offered by either side.

OFFICIAL REPORTER.

Endorsed: 12212 Nat. Exchange Bank of Tiffin, Ohio *v.* Solon L. Wiley. Bill of exceptions. Supreme court of Nebraska. Filed Aug. 13, 1901. Lee Herdman, clerk.

And on the same day, there was made to issue out of said supreme court a certain summons in error, in words and figures following, to-wit:

Summons in Error.

THE STATE OF NEBRASKA, *ss:*

To the sheriff of the county of Douglas:

You are hereby commanded to notify Solon L. Wiley that a petition in error has been filed in the supreme court of Nebraska by National Exchange Bank of Tiffin, Ohio, asking the reversal of a judgment against it rendered on the 2nd day of May, 1901, in a certain cause in the district court of Douglas county, wherein
170 the plaintiff herein was plaintiff and the defendant herein was defendant and to appear before the supreme court, at the city of Lincoln, on the 17th day of Sept., 1901, then and there to do and receive what the said supreme court shall order in the premises.

You will make due return of this summons on or before the 17th day of Sept., 1901.

Witness my hand and seal of said court, at the city this 13 day of August, A. D. 1901.

[SEAL.] LEE HERDMAN, *Clerk.*

Endorsed: General No. 12212. Supreme court. State of Nebraska. Nat. Ex. Bank of Tiffin, Ohio, *v.* Solon L. Wiley. Summons in error.

And afterward, to-wit on the 3rd day of September, 1901, said summons in error heretofore issued out of said court was returned and filed in the office of the clerk of said supreme court, with service endorsed on as follows:

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I hereby certify that on the 26th day of August, 1901, I served the within writ of summons on the within named Solon L. Wiley, by delivering to him personally in Douglas county, Nebraska, a true and duly certified copy of this writ with all the endorsements thereon.

JOHN POWER, *Sheriff,*
By JAS. ROACH, *Deputy.*

Fees.

Service and return	$.50
Copy	.25
Mileage	.30
Total	$1.05

Received sheriff's office, Aug. 14, 1901, Douglas county, 171 Nebraska, Crane & Crane.

Endorsed: Supreme court of Nebraska, Filed Sep. 3, 1901, Lee Herdman, clerk.

That on the 7th day of October, A. D. 1902, the following proceedings were had and done in the court:

The following causes were argued and submitted:

No. 12212 National Exchange Bank, Tiffin, O. *v.* Wiley. Error to Douglas county.

And, afterward, to-wit, on the 3rd day of December, A. D. 1902, there was rendered by said court and entered of record upon the journal thereof, a certain judgment in the words and figures following, to-wit:

NATIONAL EXCHANGE BANK OF Tiffin, Ohio, Plaintiff in Error, *v.* SOLON L. WILEY, Defendant in Error.	Error to the District Court of Douglas County. No. 12212. Judgment of Affirmance.

This cause came on to be heard, was taken up and argued by counsel, on consideration whereof, the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is, therefore, considered by the court that said judgment be and the same hereby is affirmed at the costs of the plaintiff in error, taxed at $—; and that a mandate issue accordingly.

And, on the same day, to-wit, the 3rd day of December, there was filed in said cause by said court a certain opinion in words and figures, following, to-wit:

172 NATIONAL EXCHANGE BANK, TIFFIN, OHIO, *v.* WILEY. } No. 12212.

Opinion Filed December 3, 1902.

Commissioner's opinion, department No. 3, unreported.

1. Evidence examined, and held sufficient to sustain the verdict.
2. In an action on a foreign judgment, rendered in proceedings in which there was no service of process on the defendant, and no waiver of such service, the defendant may show, as a complete defense, that the attorney who entered an appearance for him in such proceedings, had no authority to do so.
3. In an action on a foreign judgment taken under a warrant of attorney authorizing any attorney at law to appear in any court of record, and confess judgment against the makers of a certain note, in favor of the holder thereof, held (1) that such warrant was not a general authority to appear and confess judgment, in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder. (2) That the defendant was not estopped, by the judgment, to deny that the plaintiff was the holder of the note when such judgment was confessed. (3) That a judgment, confessed in favor of one, who at the time was not the holder of the note, was void for want of jurisdiction.

173 ALBERT, *C.*:

In 1884, the defendant and another executed a promissory note to the plaintiff which, in addition to the usual provisions, contained a warrant of attorney in this language:

"And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and service of process, and confess a judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and writ of errors, and waive all right to appeal second trial and stay of execution in our behalf, or in behalf of either of us.

WILEY CONSTRUCTION CO. [SEAL.]
S. L. WILEY, *Pres't.* [SEAL.]
S. L. WILEY. [SEAL.]"

In 1889, the plaintiff filed a petition, against the makers of the note, in the court of common pleas of the State of Ohio, for judgment thereon. No process was issued against the defendants and neither of them personally appeared in the action. An attorney-

at-law, acting in pursuance of the warrant of attorney attached to the note, appeared on the behalf of the defendants, waived the issuance and service of process and confessed judgment, in favor of the plaintiff, and against the defendants, for the amount due on the note.

Afterward the plaintiff brought an action on the judgment in
174 the district court of Douglas county, against the defendant in this case. The answer among other things, denied the existence of the judgment, and the jurisdiction of the court of common pleas to render it, and charged, generally, that such judgment was void and of no effect. The theory of the defense was that, at the time the judgment was confessed, the plaintiff was not the holder of the note on which the judgment was based, and, as the authority conferred by the warrant of attorney was limited to the confession of a judgment in favor of the holder of such note, the judgment, confessed in favor of the plaintiff when it was not the holder, was without authority, and the judgment rendered on such confession, void for want of jurisdiction. The court recognized this theory by an instruction, to the effect, that if the jury found from the evidence, that the plaintiff was the holder of the note, when the judgment was confessed, the verdict should be for the plaintiff; otherwise, it should be for the defendant. No other question was submitted to the jury. There was a verdict for the defendant, and judgment was given accordingly. The plaintiff brings error.

The plaintiff insists that it was error to submit the theory of the defense to the jury, and, in this behalf, first urges, that the evidence is insufficient to support such theory. It would serve no useful purpose to set out the evidence bearing on this question. We have examined it with some care; were it within our province to weight it,

we might arrive at a different conclusion than that reached
175 by the jury, but we are by no means sure that we should. We consider the evidence ample to warrant a finding in favor of the defendant on the question submitted to the jury.

It is next urged that the question, whether the plaintiff was the holder of the note when the judgment was confessed, is only quasi jurisdictional, and one that is conclusively presumed to have been litigated and disposed of in the action which resulted in the judgment in question. In support of this position, the plaintiff makes the general rule, stated in 12 Ency. Pl. & Pr. 211, in this langaage: "When jurisdiction depends on a fact that is litigated in a suit and such fact is found in favor of the party who avers jurisdiction, the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence thereof until set aside or reversed by a direct proceeding."

This rule, we think, is hardly applicable to the facts in this case. An examination of the authorities, cited in support of the rule, will disclose, that so far as personal actions are concerned, it applies only to cases where the parties are in court, and the jurisdiction depends on some fact or facts, litigated in the action. But, in an action on a foreigh judgment, however solemn the asservations of the record of the jurisdictional steps, the defend-

ant may show, as a complete defense, that he was never given an opportunity to defend, and never had his day in court. Thompson *v.* Whitman, 18 Wall., 457; Knowles *v.* Gas Light Co., 19 Wall., 58; Hall *v.* Lanning, 91 U. S., 160; Penoyer *v.* Neff, 95 U. S. 176 714; Cole *v.* Cunningham, 133 U. S., 107; Simmons *v.* Saul, 138 U. S., 439; Thormann *v.* Frame, 176 U. S., 356; Bell *v.* Bell, 181 U. S., 175. It is the settled rule in both the State and Federal courts, that, in an action on a foreign judgment, the defendant may successfully defend, by showing that the attorney, who entered an appearance for him, had no authority to do so. Baltzell *v.* Nosler, 1 Iowa, 588; Harris *v.* Hardeman, 14 How., 334; Sherrard *v.* Nevins, 2 Ind., 241; Thompson *v.* Emmert, 15 Ill., 415; Gleason *v.* Dodd, 4 Met., 333; Aldrich *v.* Kinney, 4 Conn., 280; Starbuck *v.* Murray, 5 Wend., 148; Wilson *v.* Bank, 6 Leigh, 570; Norwood *v.* Cobb, 24 Tex., 551; Rape *v.* Heaton, 9 Wis., 328; Price *v.* Ward, 25 N. J. L., 225; and Harshey *v.* Blackmarr, 69 Am. Dec., 520.

The inquiry in this case, then, narrows down to this question: Assuming that the plaintiff was not the holder of the note at the time the judgment was confessed, was the attorney, who entered an appearance in the court of common pleas, on behalf of the defendant, and confessed such judgment, authorized to do so? If he were, it was by virtue of the warrant of attorney. The authority conferred by such instruments has always been strictly construed. In Spence *v.* Emerine, 46 O. S., 433, it was held, that a warrant of attorney, authorizing the confession of judgment in favor of the payee of a note, would not authorize a confession of judgment in favor of a transferee, of such note, and that a judgment, taken on such 177 confession, was void for want of jurisdiction. In Cushman *v.* Welsh, 19 O. S., 536, it was held that authority to confess judgment in favor of the legal holder of a note, would not authorize a confession of judgment in favor of a holder without endorsement, he not being the legal holder.

In the present case, as we have seen, the authority conferred by the warrant of attorney was not a general authority to enter an appearance and confess a judgment in any action that might be instituted on the note, but was limited to the confession of a judgment in favor of the holder. Had the authority been to confess judgment in favor of A, it will not be claimed that a valid judgment could have been confessed in favor of B. We are unable to see how the fact that the person, in whose favor the judgment was to be confessed, was described, instead of being mentioned by name, would make any difference. We can readily see how, if the rights of third parties had intervened, the defendant might be embar-assed by the doctrine of the ostensible authority of an agent. But no such question arises in this case. The plaintiff is here seeking to enforce a judgment, which for the purposes of the argument, it is forced to admit was confessed in its favor, at a time when it was not the holder of the instrument on which the judgment is based, by any attorney, whose authority was limited to a confession of judgment in favor of the holder. Such admission, in our opinion, is fatal to the plaintiff's

contention, because it not only shows that the judgment was
178 rendered without jurisdiction, but, also that it was rendered in favor of a party not entitled to it. Such a judgment lacks every element of an estoppel and is worthless for any purpose.

It is claimed by the plaintiff that the answer does not cover the theory on which the case was submitted to the jury. The answer alleges that the court of common pleas was without jurisdiction and that the judgment is void. If there be a fault in the answer it is that some of the allegations should have been more specific. The remedy for such fault as is well known is by motion. The answer is sufficient to sustain the theory of the defense, when assailed as in the present case.

It is recommended that the judgment of the district court be affirmed.

Ames, C. and Duffie, C. concur.

By the COURT: The conclusions reached by the commissioners are approved, and it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be affirmed.

179 And, afterward, to-wit on the 10th day of January, A. D. 1903, there was filed in the office of the clerk of said supreme court a certain motion for rehearing in words and figures, following, to-wit:

In the Supreme Court of the State of Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff in Error, *vs.* SOLON L. WILEY, Defendant in Error. } Motion for Rehearing.

Plaintiff in error moves the court for a rehearing in this cause for the following reasons:

1. The judgment is contrary to law.

2. The judgment fails to give to section 1, article 4, of the Constitution of the United States and to section 905 of chapter 17 of the Revised Statutes of the United States the force and effect required by the provisions of those sections.

3. The judgment denies to the judgment of the court of common pleas in and for the county of Seneca, State of Ohio, rendered by said court July 31st, 1899, in an action wherein this plaintiff in error was plaintiff and this defendant in error was defendant, that full faith and credit required by section 1, article 4, of the Constitution of the United States and required by section 905 of chapter 17 of the Revised Statutes of the United States.

4. The plaintiff in error claims that the law of this case is that the judgment of the Ohio court above mentioned, was to the effect

that the plaintiff therein, who is the plaintiff herein, was the
180 holder of the note sued upon and that said judgment is conclusive upon the district court of Douglas county and upon this court, that the plaintiff was the holder of said note at said time in said action.

5. The cause of action sued upon in the district court of Douglas county, State of Nebraska, is a judgment of a court of general jurisdiction in the State of Ohio, at all times in full force and effect in said State, and is a personal judgment against the defendant herein, Solon L. Wiley, and is entitled under the Constitution and laws of the United States to be given the same force and effect and faith and credit as is given to it in the State of Ohio.

6. The opinion and judgment of this court in this cause is, that the testimony tending to prove that the plaintiff was not the holder of the note sued upon in the Ohio court, is evidence upon which to base a judgment that the attorney who appeared for the defendant in said action was not authorized to appear for him and that the Ohio court which rendered judgment was without jurisdiction so to do. And plaintiff in error contends that such evidence does not support the judgment rendered by this court.

7. Plaintiff in error contends that testimony tending to prove that the plaintiff is not the holder of the note sued upon, is not evidence that the attorney who appeared for the defendant in the action, was not authorized to so appear.

8. The plaintiff in error contended at the hearing of this cause and now contends, that the only evidence admissible in support of the defense that the attorney who appeared for the defendant in the Ohio court was without authority to so appear, is that
181 his signature to the note sued upon was a forgery, and that having admitted that he made, executed and delivered to the plaintiff the note sued upon, he cannot urge as a defense that the attorney who appeared for him was without authority so to do.

9. The plaintiff further contends in this cause, that the allegation in the answer that the Ohio court which rendered the judgment was without jurisdiction and the judgment is void, is not sufficient to allow evidence to be introduced that the plaintiff was not the holder of the note sued upon.

NATIONAL EXCHANGE BANK OF
TIFFIN, OHIO, *Plaintiff in Error,*
By THOMAS D. CRANE.
J. J. BOUCHER,
Attorneys for Plaintiff in Error.

Endorsed: Doc. No. 12212, In the supreme court of the State of Nebraska. National Exchange Bank of Tiffin, Ohio, plaintiff in error, vs. Solon L. Wiley, defendant in error. 4/9/03. Motion for rehearing. Supreme court of Nebraska, Filed Jan. 10, 1903. Lee Herdman, clerk. Thomas D. Crane, J. J. Boucher, 916-918 New York Life building, attorneys for plaintiff in error.

And, afterward, to-wit, on the 19th day of May, A. D., 1903, there was rendered by said court and entered of record upon the journal thereof, a certain order in the words and figures, following, to-wit:

182 In the Supreme Court of the State of Nebraska.

NATIONAL EXCHANGE BANK OF Tiffin, Ohio, Plaintiff in Error, v. SOLON L. WILEY, Defendant in Error.	Error to the District Court of Douglas County. No. 12212.

This cause came on to be heard upon a motion by the plaintiff in error for a rehearing herein, on consideration whereof by the court, it is ordered that said motion be and the same hereby is overruled and a rehearing denied.

In the Supreme Court of the State of Nebraska.

STATE OF NEBRASKA, ss:

I, Lee Herdman, clerk of the supreme court of said State do hereby certify that the foregoing is a true, correct and complete transcript of the record, proceedings and final judgment in said supreme court in a cause therein wherein The National Exchange Bank of Tiffin, Ohio is plaintiff in error and Solon L. Wiley is defendant in error as fully as the same is of record and on file in my office.

I further certify that the annexed petition for a writ of error, writ of error citation and assignment of errors, are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error, citation and assignment of errors, with the indorsements thereon.

In testimony whereof I have hereunto set my hand and the seal of said court at the city of Lincoln, this 25th day of May, A. D., 1903.

LEE HERDMAN,
Cl'k Sup. Court.

183 In the Supreme Court of the State of Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, Plaintiff in Error, vs. SOLON L. WILEY, Defendant.	Petition for a Writ of Error.

To the Honorable J. J. Sullivan, chief justice of the supreme court of the State of Nebraska:

Your petitioner, National Exchange Bank of Tiffin, Ohio, respectfully shows:

1. That at the September 1902 term of said court, a judgment was rendered against it in the above entitled cause and by the said supreme court of said State.

2. That said judgment was final.

3. That said supreme court was the highest court in said State in which a decision in the said suit could be had.

4. That in said suit there was involved and necessary to the determination thereof, the following Federal question, to-wit:

The validity of a judgment of the court of common pleas of the county of Seneca in the State of Ohio, in a suit in said court between these same parties, concerning the same subject matter; which judgment was duly pleaded and duly given in evidence on the trial of the above entitled cause.

5. That the decision of the said supreme court of said State of Nebraska was against the validity of the said judgment of the court of the other State.

6. That said decision was necessary to the judgment given by the said supreme court and without the decision thereof, the said judgment could not have been given.

184 Wherefore, petitioner prays the allowance by your honor of a writ of error to remove the record and proceedings in said suit into the Supreme Court of the United States for its revision thereof; and have a citation directed to the said Solon L. Wiley for his appearance in the said Supreme Court.

May 19th, 1903.

THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Petitioner.

Writ of error and citation in the within named cause allowed.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 12212 National Ex. Bank of Tiffin Ohio, *v.* Solon L. Wiley Petition for writ of error and order allowing writ. Supreme court of Nebraska. Filed May 19 1903 Lee Herdman clerk.

185 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between National Exchange Bank of Tiffin, Ohio, plaintiff in error, and Solon L. Wiley, defendant in error wherein was drawn in question the construction of a clause of the Constitution of the United States and of a statute of the United States, and the decision was against the right or privelege claimed under such clause of the said Constitution and said statute; a manifest error has happened, to the great damage of the said National Exchange Bank of Tiffin, Ohio as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, and filed in the office of the clerk of the Supreme Court of the United States within thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

186 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of May, in the year of our Lord one thousand nine hundred and three.

Seal United States Circuit Court, District of Nebraska.

Issued at office in the city of Omaha, Nebraska, with the seal of the circuit court of the United States for the district of Nebraska, dated as aforesaid.

GEO. H. SHUMMEL,
Clerk Circuit Court United States, District of Nebraska.

Allowed by
J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 12212 National Ex. Bank Tiffin, Ohio *v.* Solon L. Wiley Writ of error. Supreme court of Nebraska. Filed May 19 1903 Lee Herdman clerk.

187 The United States of America to Solon L. Wiley, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the supreme court of Nebraska, wherein National Exchange Bank of Tiffin, Ohio is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. J. Sullivan, chief justice of the supreme court of the State of Nebraska this 19th day of May, in the year of our Lord one thousand nine hundred and three.

J. J. SULLIVAN,
Chief Justice of the Supreme Court of Nebraska.

STATE OF NEBRASKA, }
Douglas County. }

J. J. Boucher, being first duly sworn, says that on the 22nd day of May, 1903, he delivered a true copy of the within citation to James H. McIntosh, the attorney of record for said Solon L. Wiley and the only attorney who appeared for said Solon L. Wiley in the said cause.

J. J. BOUCHER.

Subscribed and sworn to before me this 22 day of May, 1903.

[Notarial Seal, C. F. Harrison, Douglas County, Nebraska.]

C. F. HARRISON,
Notary Public.

My commission expires March 29 1908.
Due service of this citation accepted.

JAMES H. McINTOSH,
Attorney for Defendant in Error.

[Endorsed:] 12212 National Ex. Bank, Tiffin, Ohio *v.* Solon L. Wiley Citation Supreme court of Nebraska. Filed May 19 1903 Lee Herdman clerk.

188 In the Supreme Court of the State of Nebraska.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,
vs.
SOLON L. WILEY, Defendant in Error. } Supersedeas Bond.

Know all men by these presents, that we, Carlton D. Hutchinson, as surety and National Exchange Bank as principal are held and

firmly bound unto the above named Solon L. Wiley in the full and just sum of $200.00 to be paid to the said Solon L. Wiley, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Dated this 19th day of May, 1903.

Whereas, lately at a term of the above named court and in a suit depending therein wherein the above named National Exchange Bank of Tiffin, Ohio as plaintiff and Solon L. Wiley as defendant, judgment was rendered against said National Exchange Bank of Tiffin, Ohio and it having prayed and obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit; and a citation directed to the said Solon L. Wiley citing and admonishing him to be and appear at the Supreme Court of the United States to be held at Washington within thirty days from the date of said citation.

Now, the condition of the above obligation is such, that if the said National Exchange Bank of Tiffin, Ohio shall prosecute its said writ to effect and answer all costs if it fail to make its plea good then the above obligation to be void else to remain in full force and virtue.

NATIONAL EXCHANGE BANK,
By CRANE & BOUCHER,
Its Attorneys.

CARLTON D. HUTCHINSON.

In presence of
VIRGINIA PETERSON.

The above bond approved by me
J. J. SULLIVAN,
Chief Justice of the Supreme Court of the State of Nebraska.

[Endorsed:] 12212 National Ex. Bank Tiffin, Ohio *v.* Solon L. Wiley, Supersedeas bond Supreme court of Nebraska. Filed May 19, 1903 Lee Herdman clerk.

189 In the Supreme Court of the United States.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff in Error,
vs.
SOLON L. WILEY, Defendant in Error.
} Assignment of Errors.

Comes now National Exchange Bank of Tiffin, Ohio, plaintiff in error in the above entitled cause, in the supreme court of the State of Nebraska and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for that purpose, to-wit:—

1. The court erred in failing and refusing to give full faith and credit to the judgment of the court of common pleas of the county of Seneca, in the State of Ohio, and in not holding that such judgment was conclusive of the present controversy between the parties hereto; and that it entitled this plaintiff in error to judgment as prayed in its original petition herein as provided by article 4, section 1, of the Constitution of the United States and by section 905 of the Revised Statutes of the United States.

2. The court erred in holding that the judgment of the court of common pleas of the county of Seneca, in the State of Ohio, in favor of this plaintiff in error was not conclusive that this plaintiff in error was the holder of the promissory note executed by the defendant in error and which promissory note was the subject of the action in said court and was the basis of the judgment rendered by said court of common pleas in favor of this plaintiff in error and against said defendant in error.

3. The court erred in not reversing the decision of the trial court and in not awarding judgment and execution thereon to this plaintiff in error in that the decision and judgment of said trial court
190 failed to give full faith and credit to the judgment of the said court of common pleas of the county of Seneca, in the State of Ohio.

4. The court erred in holding that it was not reversible error for the trial court to submit to the jury the question whether or not the plaintiff was the holder of the note sued upon in the court of common pleas of the county of Seneca in the State of Ohio, and in instructing the jury to find for the defendant in case they believed from the evidence that in the suit in said court the plaintiff was not the holder of the note sued upon in the action in said court which instruction was in the following language, to wit:—

"If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca county, Ohio, when and wherein the judgment by confession was entered upon said note was the holder of said note then you should find for the plaintiff and assess its damages in the amount sued for to wit $11,419.68 with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th 1901 or the first day of this term of court, and add to this sum $6.50 the costs in the Ohio court, giving total in your verdict."

"But, if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally."

5. The court erred in holding that the defendant in error was not estopped by the judgment of the court of common pleas of the county of Seneca in the State of Ohio to deny that the plaintiff in error was the holder of the note sued upon when such judgment was entered by said court which holding of the court was in the following language, to wit:—"That the defendant was not estopped by the judgment to deny that the plaintiff was the holder of the note when such judgment was confessed."

191 6. The court erred in holding that the evidence was sufficient to support the verdict of the jury that the plaintiff in error herein was not the holder of the note sued upon in the action in the said court of common pleas of the county of Seneca in the State of Ohio at the time judgment was rendered in said court in favor of this plaintiff in error and against said defendant in error.

192 Plaintiff in error, therefore, prays that the judgment in the above entitled case be reviewed and reversed by the Supreme Court of the United States, that said Supreme Court of the United States proceed to a final decision of this case and award judgment and execution for plaintiff in error, or that refusing this the case may be remanded to the supreme court of Nebraska, with instructions to enter judgment for plaintiff in error.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, *Plaintiff in Error*,
By CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER, *Its Attorneys*.

193 [Endorsed:] 12212 National Exchange Bank Tiffin Ohio *v.* Solon L. Wiley Assignments of error. Supreme court of Nebraska. Filed May 19 1903 Lee Herdman clerk.

194 In the Supreme Court of the United States.

NATIONAL EXCHANGE BANK OF TIFFIN, Ohio, Plaintiff in Error, *vs.* SOLON L. WILEY, Defendant in Error.	Stipulation of Record to be Printed.

It is hereby stipulated by and between the parties hereto that the record in this case be printed by the clerk of this court as follows:—

1. All of said record in said case is to be printed in accordance with the rules of court except the following portions being formal parts of the bill of exceptions contained in said record and found on the pages following:

2. Omit pages 29 and 30 and down to the words "Filed Jul- 11 1901," at the middle of page 31.

3. Omit all formal objections to deposition of J. M. Naylor beginning on page 35 with the words "The following questions are objected to and the following rulings of the court" and continuing on pages 36 and 37.

4. Omit formal objections to deposition of J. W. Chamberlain on page 37 beginning with the words "The following questions are objected to" and continuing on pages 38, 39 and 40.

5. Omit formal objections to the deposition of John McCauley on page 40 beginning with the words "The following questions were objected to and rulings made" and continuing on pages 41 and 42.

6. Omit formal objections to the deposition of J. W. Schaufelberger on page 42 beginning with the words "The following questions being objected to" including page 43 down to the words "With this the plaintiff rests."

7. Omit all of page 44 after the words "rests until two o'clock." at top of page.

195 8. Omit all of page 45.

9. Omit caption of deposition on page 46.

10. Omit certificate of notary to deposition beginning about the middle of page 79 and continuing on and including page 84.

11. Omit pages 85 to 90 inclusive.

12. Omit certificate of notary to deposition beginning about the middle of page 119 with the words "State of Ohio, Seneca county, *ss.*" and down to the words "E-hibit A" on page 120.

13. Omit pages 149 and 150.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, *Plaintiff in Error*,
By CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER, *Its Attorneys.*
SOLON L. WILEY, *Defendant in Error*,
By JAMES H. McINTOSH, *His Attorney.*

196 [Endorsed:] File No. 18967. Supreme Court U. S. October term, 1902 Term No. 316. National Exchange Bank of Tiffin, Ohio, pl'ff in error, *vs.* Solon L. Wiley. Stipulation as to printing record. Filed June 8, 1903.

Endorsed on cover: File No. 18967. Nebraska supreme court. Term No. 316. National Exchange Bank of Tiffin, Ohio, plaintiff in error, *vs.* Solon L. Wiley. Filed June 8, 1903. File No. 18967.

IN THE

SUPREME COURT OF THE UNITED STATES.

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,
v.
SOLON L. WILEY,
Defendant in Error.
} No. 316.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF FOR PLAINTIFF IN ERROR.

CONSTANTINE J. SMYTH,

THOMAS D. CRANE,

J. J. BOUCHER,

Attorneys for Plaintiff in Error.

JAMES H. MCINTOSH,

Attorney for Defendant in Error.

STATEMENT OF THE CASE.

The National Exchange Bank of Tiffin, Ohio, plaintiff in error, brought an action in the district court of Douglas County, Nebraska, against Solon L. Wiley, defendant in error upon a judgment of the court of

common pleas of Seneca County, Ohio, rendered pursuant to a warrant of attorney authorizing a confession of judgment in favor of the holder of the instrument. In the Douglas County, Nebraska, district court there was judgment for the defendant, which was affirmed by the supreme court of Nebraska, and the plaintiff in error has prosecuted a writ of error to this court. The contention of the defendant sustained by the Nebraska courts was that the plaintiff was not the holder of the instrument in the Ohio court and that therefore that court did not have jurisdiction over the person of the defendant.

A statement of facts follows:

On the 26th day of April, 1884, Solon L. Wiley (hereinafter called the defendant), together with the Wiley Construction Co., borrowed $10,000.00 from the National Exchange Bank of Tiffin, Ohio (hereinafter called the plaintiff), and thereupon executed and delivered to the plaintiff a certain instrument in writing, of which the following is a copy (Record 82):

"EXHIBIT A."

$10,000.00. TIFFIN, Ohio, April 26, 1884.

October 1, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange Bank, or order, at its office in Tiffin, Ohio, ten thousand dollars with 8 per cent. interest after maturity. And hereby authorizes N. L. Brewer, or any attorney-at-law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, in favor of the holder of this instrument for the amount then appearing due, together with costs of

suit, and thereupon to release all errors, and writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us.

Second trial. WILEY CONSTRUCTION CO. [SEAL]
S. L. WILEY, Pres't. [SEAL]
S. L. WILEY. [SEAL]

P. O., Greenfield, Mass.
Due Oct. 1.

Said note is endorsed on back as follows:

45170 May 9, 1887. Paid on the within $6,311.75.

The certificate of authority of the plaintiff bank expired March 17th, 1885, but it is still lawfully exercising its franchise for the purpose of liquidating its affairs. Upon the expiration of its certificate a portion of its assets was transferred to the Tiffin National Bank, organized at that time. Several of the officers of the plaintiff bank became officers in the new bank, among them being Mr. Naylor, a director, and Mr. Chamberlin, cashier, who became respectively president and cashier. The testimony of these officers appears in the record. There is absolutely nothing in the record indicating that the note in question was among the assets transferred to the new bank. Besides this, the testimony of the officers above named is positive and uncontradicted that it was not included in that transfer, but has always remained the property of the plaintiff bank and that they, as officers of the plaintiff bank, directed the bringing of the action in the Ohio court.

On July 31, 1899, the plaintiff filed its petition in an action on the note in the court of common pleas in Seneca County, Ohio, against the defendant and the Wiley Construction Co., alleging the execution and delivery of the note and the warrant of attorney to the

plaintiff, that the note was unpaid except as shown by the endorsements thereon, that there was "due the plaintiff on said note the sum of five thousand, seven hundred and seventy-two dollars and seventy cents, with interest at the rate of 8 per cent. per annum from the 9th day of May, A. D., 1887," and praying for judgment accordingly. A copy of the note and warrant of attorney was attached to the petition. (Record 81.)

In accordance with the terms of the warrant of attorney, one John Bender, an attorney-at-law, appeared and filed an answer, entering an appearance for the defendants, waiving the issuance and service of process and confessing judgment in favor of the plaintiff and against both defendants for the sum of $11,418.68, that being the amount due and for costs. (Record 83.) Thereupon judgment was rendered as follows (Record 83):

"NATIONAL EXCHANGE BANK OF TIFFIN, OHIO, *Plaintiff*,
vs.
WILEY CONSTRUCTION COMPANY AND S. L. WILEY, *Defendants*.
} Cognovit.

This day came the plaintiff by its attorney; also appeared in open court, John Bender, an attorney-at-law of this court, and by virtue of the warrant of attorney annexed to the note, attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in this action, and confessed a judgment on said note against said defendants, and in favor of said plaintiff for eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of principal and interest due on said note, and for the costs taxed and to be

taxed, and released and waived all exceptions, errors and right of appeal in the premises.

It is, therefore, considered that said plaintiff recover of said defendants the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of said note, with interest computed at 8 per cent. per annum, from the 9th day of May, A. D., 1887, and also its costs herein expended taxed at $6.50."

On June 22d, 1900, the plaintiff filed its amended petition against the defendant in the district court of Douglas County, Nebraska, alleging, among other things, that on July 31st, 1899, it recovered a judgment against Wiley Construction Co. and S. L. Wiley, duly given by the court of common pleas in and for the County of Seneca, State of Ohio, for the sum of $11,-419.68 and $6.50 costs of suit in an action then pending in said court; that S. L. Wiley and Solon L. Wiley were one and the same person; that no part of the judgment had been paid, and praying for judgment accordingly. (Record 3.)

The answer of the defendant (Record 4–7) contained a general denial. In addition thereto it was alleged that on April 26, 1884, Wiley Construction Company and the defendant signed a promissory note to the order of the National Exchange Bank, due October 18th, 1884, with eight per cent. interest after maturity. That on "the 2nd day of March, 1885, the Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein; nevertheless, this defendant is informed and believes, and upon information and belief states that said note forms the basis of the pretended judgment upon which

the said plaintiff now brings this suit." That the note was "outlawed." That neither the defendant nor Wiley Construction Company ever had any notice or knowledge of the pendency of the suit in the Ohio court or were served with summons or entered their appearance therein, that consequently the court was without jurisdiction to render the judgment and that same was void. That in December, 1885, the National Exchange Bank, plaintiff, commenced an action on the note in a court in the State of Connecticut against the Wiley Construction Company, and that at the October, 1886, term of that court a trial was had and judgment rendered in favor of the construction company; that thereupon under an agreement between this defendant and this plaintiff, this defendant paid the costs of that action, and such payment was received in full satisfaction of all claim against him on the note.

In another paragraph the warrant of attorney, as above set forth, is set out in full, coupled with the allegation that same is one of the provisions of the note and "that the said plaintiff pretends that pursuant to said provision of said note, one John Bender entered an appearance for said Wiley Construction Company and S. L. Wiley, in the court of common pleas of Seneca County, Ohio, on the 31st day of July, 1899, and there and then confessed judgment in favor of said plaintiff on said note," and that by reason of said confession of judgment, and not otherwise, the plaintiff claims to have recovered the judgment against the defendant. The prayer was for an injunction restraining the plaintiff from attempting to collect or enforce the judgment.

The plaintiff replied (Record 8-9) with a general

denial followed by allegations setting up the note and warrant of attorney, and that in accordance therewith, John Bender, an attorney at law entered the appearance of the defendant in the action and confessed the judgment sued on; that under the laws of Ohio the courts of that state were authorized to and had full power and jurisdiction to render judgment upon the warrant of attorney contained in said note, and that by reason of said warrant of attorney it was unnecessary that the defendant be served with summons or personally enter his appearance in the action.

Upon these pleadings the case was tried.

At the trial the plaintiff produced in evidence a transcript of the judgment of the Court of Common Pleas of Seneca County, Ohio, authenticated as provided by law, showing the rendition of a judgment July 31st, 1899, against Wiley Construction Company and S. L. Wiley, the defendant, on a warrant of attorney. (Record 81–84.)

It was admitted at the trial that Solon L. Wiley, the defendant, and S. L. Wiley were one and the same person. (Record 19.)

The deposition of J. M. Naylor, director of the plaintiff bank, and president of the Tiffin National Bank, was read by the plaintiff to the effect that the National Exchange Bank, plaintiff, was at all times the owner and holder of the note and judgment described in the pleadings and entitled to the proceeds thereof. (Record 23–30.)

The deposition of J. W. Chamberlin, cashier of both banks, to the same effect, was read by the plaintiff. (Record 30–34.)

The depositions of John McCauley and J. W.

Schaufelberger, two Ohio lawyers, to the effect that the laws of Ohio authorized the courts of that state to render judgments on warrants of attorney, were likewise read to the jury. (Record 34–41.)

The defendant then introduced in evidence "Exhibit E" attached to the deposition of J. W. Chamberlin, cashier, taken by the defendant. This exhibit was a record of certain meetings of the directors of the plaintiff bank held February 24th, 1885, and on March 2nd, 1885, wherein among other things it was recited that the corporate existence of the bank expired by limitation March 1st, that the bank would be succeeded by the Tiffin National Bank, and that the full board of directors were appointed to confer with a like committee from the Tiffin National Bank and agree upon a value to be placed on the transferable assets of the bank, including bank building and United States bonds, to be sold to Tiffin National Bank. There was also a report of the directors determining the value to be placed on the assets to be transferred. One of the items of assets is described as follows: "Net worth of discounts as per schedule $160,871.38;" (Record 67-69). No schedule is attached to the exhibit, nor does one appear in the record nor is there anything in the record to indicate that the note in question was included in the schedule. This was the only testimony introduced by the defendant in his attempt to show that the note had been transferred by the plaintiff bank to the Tiffin National Bank or to support his contention that the plaintiff was not the holder of the note when judgment was rendered by the Ohio court.

This was all of the defendant's testimony.

The plaintiff in rebuttal then read from the depo-

sition of J. W. Chamberlin, taken by the defendant, to the effect that several of the officers of the plaintiff bank at the time it went into liquidation became officers in the new bank, and the books and papers of the plaintiff bank including this note were kept in the vault and office room of the Tiffin National Bank under the direction and control of the board of directors of the plaintiff bank, and that this was also true at the time of the taking of the testimony and that they directed the bringing of the action on the note.

It was also shown by the testimony of Mr. Naylor that from time to time during this period of liquidation dividends had been declared to the stockholders of the National Exchange Bank from paper collected and that the note and warrant of attorney had never been out of the possession or ownership of the National Exchange Bank, plaintiff. (Record 30–41.)

At the close of all the testimony the plaintiff moved the court to direct a verdict in its favor, which motion was overruled.

The third, fourth and fifth instructions of which the plaintiff complains are as follows. (Record 12):

'Third. But you are instructed that under the law and the evidence in this case as it now stands, there is but one question for you to determine from the evidence, that is, was the plaintiff in the action in the court of common pleas of Seneca County, in which court judgment was rendered by confession for plaintiff July 31st, 1899, the holder of the note therein sued upon, and you have nothing whatever to do with any other question or argument on any other question. All other questions as to payment, etc., have been settled, so far as you are concerned, by the binding judgment of the Ohio court, and the burden of proving that the plaintiff

in said suit was not the holder of said note is upon the defendant herein."

"Fourth. You are instructed that as a matter of law in this case, it is presumed that the court of common pleas in Ohio acted regularly, and that the plaintiff in the action therein brought was the holder of the note therein sued upon and that said court had jurisdiction to render the judgment therein made and herein sued upon, and such presumption continues throughout this case until such time as it shall be overcome by a preponderance of the evidence that such were not the facts and the burden of showing by a preponderance of the evidence that such presumptions were not true is upon the defendant in this case as above instructed."

"Fifth. If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca County, Ohio, when and wherein the judgment by confession was entered upon said note, was the holder of said note, then you should find for the plaintiff and assess its damages in the amount sued for, to-wit: $11,419.68, with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th, 1901, or the first day of this term of court, and add to this sum $6.50, the costs in the Ohio court, giving total in your verdict."

"But, if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally."

As heretofore stated, the trial resulted in a verdict and judgment for the defendant, which judgment was affirmed by the supreme court of Nebraska. (Record 87–90.)

The holding of that court affirming the judgment is summed up in paragraph 3 of the syllabus:

"In an action on a foreign judgment taken under a

warrant of attorney authorizing any attorney-at-law to appear in any court of record and confess judgment against the makers of a certain note, in favor of the holder thereof, held (1) that such warrant was not a general authority to appear and confess judgment in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder. (2) That the defendant was not estopped, by the judgment, to deny that the plaintiff was the holder of the note when such judgment was confessed. (3) That a judgment, confessed in favor of one, who at the time was not the holder of the note, was void for want of jurisdiction.'

There was no question at the trial but that the laws of Ohio authorized the courts of that state to render judgment in accordance with the terms of a warrant of attorney.

The supreme court of that state has so decided.

Spence v. Emerine, 46 Ohio St., 437–441.

Neither was there any contention that the enforcement of such judgments was contrary to the policy of the law of Nebraska. The supreme court of that state in the case of *Snyder v. Critchfield*, 44 Neb., 66, decided in 1895, has declared the law applicable to such judgments. Therein it is said:

"A judgment of a court of a sister state, authenticated as prescribed by act of congress, is conclusive here upon the subject-matter of the suit. An action thereon can only be defeated on the ground that the court had no jurisdiction of the case, that there was fraud in procuring the judgment, or by defenses based on matters arising after the judgment was rendered."

"A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are

authorized, has the same force, when sued on here, as a judgment on adversary proceedings."

"In an action on such judgment, payment of the debt before judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action cannot be availed of. The judgment itself is conclusive against such defenses."

Assignment of Errors in this Court.

1. The court erred in failing and refusing to give full faith and credit to the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, and in not holding that such judgment was conclusive of the present controversy between the parties hereto; and that it entitled this plaintiff in error to judgment as prayed in its original petition herein as provided by article 4, section 1, of the Constitution of the United States, and by section 905 of the Revised Statutes of the United States.

2. The court erred in holding that the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, in favor of this plaintiff in error was not conclusive that this plaintiff in error was the holder of the promissory note executed by the defendant in error and which promissory note was the subject of the action in said court and was the basis of the judgment rendered by said court of common pleas in favor of this plaintiff in error and against said defendant in error.

3. The court erred in not reversing the decision of the trial court and in not awarding judgment and execution thereon to this plaintiff in error in that the decision and judgment of said trial court failed to give

full faith and credit to the judgment of said court of common pleas of the County of Seneca, in the State of Ohio.

4. The court erred in holding that it was not reversible error for the trial court to submit to the jury the question whether or not the plaintiff was the holder of the note sued upon in the court of common pleas of the County of Seneca, in the State of Ohio, and in instructing the jury to find for the defendant in case they believed from the evidence that in the suit in said court the plaintiff was not the holder of the note sued upon in the action in said court, which instruction was in the following language, to-wit:

"If you believe from the evidence that the plaintiff in the action in the court of common pleas of Seneca County, Ohio, when and wherein the judgment by confession was entered upon said note was the holder of said note then you should find for the plaintiff and assess its damages in the amount sued for, to-wit, $11,419.68, with interest thereon at eight per cent. from the 31st day of July, 1899, to February 4th, 1901, or the first day of this term of court, and add to this sum $6.50, the costs in the Ohio court, giving total in your verdict."

"But if you do not believe from the evidence that the plaintiff was at said time the holder of the note therein sued upon, then you should find for the defendant generally."

5. The court erred in holding that the defendant in error was not estopped by the judgment of the court of common pleas of the County of Seneca, in the State of Ohio, to deny that the plaintiff in error was the holder of the note sued upon when such judgment was entered by said court, which holding of the court was in the following language, to-wit:

"That the defendant was not estopped by the judgment

to deny that the plaintiff was the holder of the note when such judgment was confessed."

6. The court erred in holding that the evidence was sufficient to support the verdict of the jury that the plaintiff in error herein was not the holder of the note sued upon in the action, in the said court of common pleas of the County of Seneca, in the State of Ohio, at the time judgment was rendered in said court in favor of this plaintiff in error and against said defendant in error.

THE PLAINTIFF CONTENDS.

1. That the answer does not state a defense to the plaintiff's petition, but instead, confesses same.

2. That in any view of the case there is no evidence in support of the finding that the plaintiff was not the holder of the note in the Ohio court.

3. That under the full faith and credit clause of the Constitution of the United States the judgment of the Ohio court is conclusive that the plaintiff therein was the holder of the note.

ARGUMENT.

First. The Answer Does Not State a Defense to the Plaintiff's Petition, but Instead, Confesses Same.

The petition alleges the recovery of a judgment on the 31st day of July, 1899, by the plaintiff against the defendant in the court of common pleas of Seneca County, Ohio.

The answer sets up the execution and delivery of a promissory note by the defendant to the plaintiff: "That on to-wit: The 2nd day of March, 1885, the

Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein;" that the note had in it the following provision: "And hereby authorizes N. L. Brewer, or any attorney-at-law in the United States or elsewhere, to appear before any court of record after the above obligation becomes due, and waive the issuing and service of process, and confess judgment against us, or any or either of us, in favor of the holder of this instrument, for the amount then appearing due, together with the costs of suit, and thereupon to release all errors and writs of errors, and waive all right of appeal and stay of execution in our behalf, or in behalf of either of us;" that "pursuant to said provision of said note, one John Bender entered an appearance for said Wiley Construction Company and S. L. Wiley, in the court of common pleas of Seneca County, Ohio, on the 31st day of July, 1899, and then and there confessed judgment in favor of said plaintiff on said note;" and that by reason of said confession of judgment the plaintiff claims to have recovered judgment against the defendant.

It thus appears by the answer itself that the defendant executed and delivered to the plaintiff a note and warrant of attorney authorizing any attorney-at-law to appear for him without process in any court of record and confess judgment against him; that pursuant to such authority, an attorney did appear for him in an action by the plaintiff against him on the note in a court of general jurisdiction and confess judgment against him; and that such judgment constituted the cause of action set up in the petition.

The answer thus brings this case clearly within the

case of *Teel v. Yost*, 128 N. Y., 387. That was an action on a judgment of a Pennsylvania court, which judgment, like the one sued on in the case at bar, was rendered on a warrant of attorney. Therein it is said, quoting from *Shumway v. Stillman*, 6 Wend., 453, as follows:

> "'That the judgment of a court of general jurisdiction, in any state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications. First. If it appears by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and, second, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him.' This case has been quite uniformly cited and approved as a leading case in subsequent cases in this state."

> "Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon any one to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it."

The case at bar is even stronger than the case above cited. Here there is not only a judgment in an action in which it appears by the record that the defendant appeared by attorney, but that defendant when sued on that judgment, not only does not attempt to

disprove the authority of the attorney to appear for him, but instead, alleges facts which show conclusively that the attorney had due authority to enter the appearance of the defendant and confess the judgment.

Second. That in Any View of the Case There is No Evidence in Support of the Defendant's Contention That the Plaintiff Was Not the Holder of the Note in the Ohio Court.

It will be remembered that in his answer the defendant sets up that on March 2nd, 1885, The Tiffin National Bank purchased the note in question and has at all times since owned it. It is further alleged that in December, 1885, this plaintiff brought suit in Connecticut on this note against the Wiley Construction Co., resulting in a judgment for the company at the October, 1886, term of the court; that it was thereupon agreed between the plaintiff and this defendant that if he would pay the costs of the Connecticut suit he should be relieved from all liability on the note; that he did pay such costs and such payment was received and treated by the plaintiff in full discharge of his liability.

It will be noticed that the suit in Connecticut by this plaintiff on the note and the agreement between this defendant and this plaintiff with reference to the payment of costs of that suit, were *almost two years after the time at which it is alleged that the note was transferred to the Tiffin National Bank.*

The only evidence produced by the defendant even tending to support his contention that the plaintiff was not the holder of the note is a report of a committee

of the plaintiff bank February 24, 1885, that they had agreed with a like committee of the Tiffin National Bank fixing the value of the discounts to be transferred to the latter bank as per schedule. As heretofore stated, this schedule is not in the record, and there is nothing to indicate that it contained the note in question. (Record 67–69.)

Opposed to this is the positive uncontradicted testimony of Chamberlin, cashier of both banks, and of Naylor, director of the plaintiff bank and president of the Tiffin National Bank, that the note has always remained the property of the plaintiff bank and that the Tiffin National Bank had never had any interest therein.

Clearly if the note had been so transferred, it would bear some evidence of that fact, some indorsement indicating an assignment. Nothing of the kind however appears. The original was in the hands of the attorney for the defendant at the time of the taking of depositions and several copies appear in the record.

The note was made payable to the National Exchange Bank; the National Exchange Bank brought the suit in the Ohio court and recovered the judgment; and, the National Exchange Bank brought the action in the Nebraska court on that judgment.

It is apparent that the fact that the plaintiff bank went into liquidation soon after this note became due, and transferred some of its assets to the Tiffin National Bank and that some of the officers in the plaintiff bank accepted official positions with the Tiffin National Bank has been seized upon by the defendant without any warrant whatever as the basis for his contention that

at that time the latter bank became the holder of the note.

Third. Under the Full Faith and Credit Clause of the Constitution of the United States, the Judgment of the Ohio Court is Conclusive That the Plaintiff Therein Was the Holder of the Note.

The assignment of errors that the Nebraska courts failed to give full faith and credit to the judgment of the Ohio court; that it was error to hold that the judgment of the Ohio court was not conclusive that the plaintiff was the holder of the note therein sued on and the defendant estopped to assert the contrary; and, that it was error to submit to the jury the question whether or not the plaintiff in the Ohio court was the holder of the note sued on in that court, will be discussed together under this subdivision.

The law is well settled that in actions in the courts of any state upon judgments of a sister state the defendant may always show as a complete defense, either that the court rendering the judgment sued upon did not have jurisdiction of the subject matter of the action, or did not have jurisdiction over the person of the defendant.

In the present action the jurisdiction of the Ohio court over the subject matter of the action cannot be, and was not, called in question because that was a transitory action, and the court was a court of general jurisdiction. The only question then remaining is whether or not the Ohio court had jurisdiction of the person of the defendant.

It was the contention of the defendant, sustained

by the Nebraska court, that the allegation contained in the answer that "the Tiffin National Bank purchased, received and became the holder of said note, thence has been and still is the holder thereof, and the said plaintiff has never been the holder thereof, or in any way interested therein," was a plea that the court which rendered the judgment did not have jurisdiction over the person of the defendant and that consequently it was competent to receive evidence to that effect.

In other words: If the plaintiff in the Ohio court was not the holder of the note, although the defendant appeared in the action, then, in the language of the Nebraska supreme court, the defendant "was never given an opportunity to defend and did not have his day in court;" while, if the plaintiff in the Ohio court was the holder of the note, then the defendant "was given an opportunity to defend and did have his day in court." Thus the jurisdiction of the Ohio court over the person of the defendant was made to depend not upon service of process upon him, or lack of such service; not upon the validity or invalidity of the warrant of attorney; but, instead upon whether or not the payee of the note sued upon had, or had not, transferred same.

The jurisdiction of the court over the person of the defendant was thus made to depend, not upon the status of the defendant in the action, but instead upon the status of the plaintiff in the action.

In the case at bar it is not controverted but that when the Ohio judgment was rendered there was a cause of action existing against the defendant for the amount of the judgment. It is likewise not controverted but that the Ohio court had power to grant the

relief sought in that action. The defendant being before it and owing that relief to some person, the sole and only point in controversy was whether or not he owed it to the plaintiff. That was a question which the court was competent to decide and its decision thereon is conclusive against collateral attack.

"In an action against a sheriff, for the escape through his negligence, of a judgment debtor, against whose person an execution had issued, and under which he was held in custody, the defense, that the plaintiff in the former suit was not the proper party to bring the action, is not available. The recovery of the judgment in that case is conclusive as to the right of the plaintiff thereto, upon the parties in this action."

Richtmeyer v. Remsen, 38 N. Y., 206.

To the same effect are—

Reed v. Spoon, 66 N. C., 415.

Fisher v. Williams, 57 Vt., 586.

Manifestly a plea by a defendant in an action that the plaintiff is not "the holder of the instrument sued on but has disposed of same" is no more nor less than a plea that the plaintiff is not "the real party in interest." Such pleas are very often met with in adversary proceedings because of the provision of the code that all actions must be brought in the name of "the real party in interest." It is never considered, however, that such plea calls in question the jurisdiction of the court over the person of the defendant, or that in sustaining, or in overruling such plea that it is thereby determined that the court has, or has not, such jurisdiction. It is simply a determination that *that particular plaintiff*, as distinguished from all other

persons, either has, or has not, the right to invoke the court to render judgment in his favor on the particular cause of action set up in the petition. Every petition must contain allegations showing that the plaintiff is the party entitled to maintain the action. If these allegations are wanting, the petition is insufficient. If they are contained in the petition then they may be controverted in that action by the defendant. If they are controverted by the defendant, then there is an issue of fact to be decided by the court prior to the rendition of judgment. But, whether controverted or not, a final judgment by the court in favor of the plaintiff is considered to be a finding and judgment that the plaintiff is the real party in interest, "the holder of the note," or of the claim sued upon and conclusive against collateral attack.

Whether or not the Plaintiff was the Holder of the Note is not a Jurisdictional Question but is Instead a Quasi Jurisdictional Question, and the Judgment of the Ohio Court is Conclusive Thereon.

A *quasi* jurisdictional allegation as distinguished from a jurisdictional allegation is one necessary to be made to authorize the court to render judgment, in favor of the plaintiff. It has nothing whatever to do with the jurisdiction of the court over the subject matter of the action nor over the person of the defendant.

It is an allegation which shows that the plaintiff is the real party in interest, the only person as distinguished from all other persons who has the right to invoke the court to render judgment in the action. It is an allegation, which, if omitted, would render the petition subject to demurrer as not stating facts suf-

ficient to entitle the plaintiff to recover. It is an allegation the want of which does not show that the court has not the necessary jurisdiction to grant the relief prayed for, but only that the court has not the necessary jurisdiction to grant that relief or any relief *to that particular plaintiff.*

But every authority is to the effect that if the court does proceed to judgment that then these allegations cannot be controverted in a collateral proceeding. In other words—*The judgment of the court is conclusive as to every allegation of fact necessary to be made by the plaintiff, and made by him, which shows a liability of the defendant to him.*

In 12 Encyc. Pl. & Pr. 211, it is said:

"When jurisdiction depends on a fact that is litigated in a suit, and such fact is found in favor of the party who avers jurisdiction, the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence thereof until set aside or reversed by a direct proceeding."

In the foot notes it is said:

"Where a court exercising general jurisdiction over the subject-matter of the litigation is presented with a case of such character that, before rendering final decree or judgment, it must determine whether it has jurisdiction to pass such judgment or decree, and it is passed, the jurisdiction cannot be assailed collaterally. * * * Whenever the right of a court to proceed in a particular case depends upon the existence and determination of certain jurisdictional facts, if it does determine such facts its decision is conclusive. * * * There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi*-jurisdictional facts without allegation of which the court cannot

be set in motion, and without proof of which a decree should not be pronounced. When such *quasi*-jurisdictional facts are proved, they are conclusive in a collateral proceeding."

A large number of cases are cited which sustain the text in every particular, among them the following:

Reinach v. Atlantic, etc. R. Co., 58 Fed., 43.

Betts v. Bagley, 12 Pick., (Mass.) 572.

Holcomb v. Phelps, 16 Conn., 132.

Wright v. Douglas, 10 Barb., (N. Y.) 97.

Ex Parte Stearnes, 77 Cal., 156.

Bostwick v. Skinner, 80 Ill., 153.

Wing v. Dodge, 80 Ill., 564.

Young v. Lorain, 11 Ill., 624.

Reinach v. Atlantic, etc. R. Co., 58 Fed. Rep., 43, is particularly applicable to the case at bar. The facts are stated in the syllabus:

"In a suit in a state court to foreclose a railroad mortgage, the trustees in a prior mortgage of a portion of the property filed a cross-bill, claiming priority. Thereupon a committee appointed for the purposes of a former litigation by holders of the bonds secured by such prior mortgage entered into a contract postponing payment thereof, subject to approval of the court. The nature of the committee's appointment was brought to the attention of the court, but it confirmed and proceeded to carry out the contract for extension. Held, that, as the court had jurisdiction of the subject-matter and the parties, the question of the committee's authority was only quasi-jurisdictional and the court's decision thereof, was conclusive, so that a federal court could not question the proceedings based thereon in a collateral proceeding brought by a bondholder who was a party to the contract

appointing the committee. Such bondholder's remedy was by appeal from the decree of the state court."

The distinction between jurisdictional and *quasi*-jurisdictional facts is stated by the court as follows:

"There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi*-jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be announced. In the absence of the former the judgment of the court is void, and may be attacked in collateral proceedings, while in respect to the latter it is conclusive, and cannot be questioned except on review."

The case of *Holcomb v. Phelps*, 16 Conn., 126, illustrates the distinction drawn by the authorities. There is a clear statement of the law and the facts in the syllabus as follows:

"The decision of a court of competent jurisdiction, is conclusive upon the parties, as to the title claimed under it, and as to the facts directly put in issue and determined; so that such title or facts cannot be again contested, between the same parties, in the same court or any other. And where the court has a peculiar and exclusive jurisdiction, its decree is binding upon the judgment of any other court, in which the same subject comes immediately into controversy.

"These principles are applicable to the sentences of foreign courts and especially to the decisions in the several states of this Union, which, by the constitution, are to have the same effect in other states as in the states where they were made.

"Where the deceased, though born and educated in this state, had, for a long time, made the city of New York his place of business; had placed most

of his property there; had there left the evidence of his debts; and there his debtors resided; the surrogate of the City of New York, to whose jurisdiction the subject appertained, after a full hearing of the parties, granted administration to A, an inhabitant of this state, who took possession of the assets of the deceased, and removed them to his residence here; after which, B, one of the parties before the surrogate's court, took administration on the same estate from the court of Probate here, and then brought trover against A, for the chattels of the deceased, in his hands; it was held, that the decree of the surrogate's court afforded A, a complete protection, and consequently, the action was not sustainable."

A like conclusion in a similar case was reached in *Bostwick v. Skinner*, 82 Ill., 147, except that in this case the parties averring want of jurisdiction in the court appointing the administrator were not in court at the time of the appointment. The court said:

"The case would be quite different if the record itself disclosed that the intestate did not reside in Cook County prior to his death, or if the court could take judicial cognizance of the actual domicile of parties without proof."

Accordingly it may be suggested in the case at bar that this case would be quite different if the record itself disclosed that the plaintiff was not the holder of the note or if the court could take judicial cognizance of the actual holder of a note without proof.

The court cited and approved a former decision in this language:

"In *Fitzgibbon v. Lake*, 29 Ill., 165, ejectment was brought for certain lands and the defendant claimed under a guardian's sale. One of the objections made to the record of the guardian's sale was, that the petitioner was not guardian,

and had no authority to institute the proceeding, but the court said: 'Whether the petitioner was the guardian and had authority to institute the proceedings was for that court to determine when it heard the petition. It decided he was, by granting the order, and we can not reverse that decision here.'"

It is impossible to draw a distinction between that case wherein the judgment of a court that a certain party was a guardian and authorized to institute certain proceedings, was held to be conclusive, and the judgment of the Ohio court in the case at bar, wherein it was adjudged that the plaintiff was the holder of the note sued upon.

In *Betts v. Bagley*, 12 Pick., (Mass.) 572, Bagley was discharged as a bankrupt under the insolvent law of New York and later this action was brought by Betts, a creditor in Massachusetts, for the enforcement of his claim. That law required that two-thirds of the creditors of the insolvent should petition for the discharge and in this action it was contended that two-thirds of the creditors had not so petitioned.

The opinion is by CHIEF JUSTICE SHAW, and at page 582 he says, referring to the judge of the New York court: "If he had jurisdiction, then it follows that whether there were two-thirds or not among the creditors was a fact to be judicially tried and proved and one upon which the adjudication of the magistrate was conclusive, and one, of which the discharge setting forth that such fact was satisfactorily proved, is conclusive evidence."

In *Wright v. Douglass*, 10 Barb., (N. Y.) 97, it is said at page 99, "In respect to a court of general jurisdiction it is to be presumed that the court had jurisdic-

tion, *till the contrary appears.* But the want of jurisdiction may always be shown by evidence, except when jurisdiction depends upon a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed, by a direct proceeding by appeal, or a writ of error."

In the case of Ex Parte Stearnes, 77 Cal., 156, the facts are stated in the syllabus as follows:

"When the superior court upon the return of *habeas corpus*, finds upon the testimony that the prisoner was in the custody of the officer in the county in which the court is held at the time of the service of the writ, and that he had the power to produce his body in answer to the writ, such adjudication is conclusive, and the action of the superior court in punishing the officer for contempt in refusing to produce the prisoner will not be reviewed in the supreme court upon *habeas corpus*, brought to relieve the officer from such punishment, upon evidence that the prisoner was out of the county at the time the writ was served, and that it was out of the power of the officer to produce him, because he was in the custody of the sheriff of another county."

At page 162 of the opinion it is said—"When jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding."

Young v. Loraine, 11 Ill., 624, was an action calling in question the validity of a sale made by a guardian under a judgment of the circuit court.

At page 637 it is said:

"When the jurisdiction is thus established, and the court is authorized to hear, it follows, as a necessary consequence, that it is authorized to adjudge, and that judgment being thus entered by authority of law, no matter how erroneous it may be, or even absurd, though it may be in palpable violation of the law itself, and manifestly against the evidence—is, nevertheless, binding upon all whom the law says shall be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment, it cannot be inquired into, nor its regularity questioned in any collateral proceeding. In another action the inquiry is not whether the court acted properly, but had it a right to act at all? Was the judgment rendered in the exercise of an usurped power, or of a conferred authority? If the former, the whole proceeding is utterly void, everywhere. If the latter it is always obligatory, till reversed. The rule, then, is a very simple one, and ordinarily of easy application. The inquiry is not whether the proof was sufficient, but was such a case presented to the court as called upon it, under the statute, to act, to deliberate, and to decide? Was its aid properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment. Indeed nothing can be alleged against it now."

The case of *Simmons v. Saul*, 138 U. S., 439, is decisive of the case at bar. In that case one Robert M. Simmons at the date of his death was domiciled in Louisinia, and was possessed of a certain land claim which authorized the holder to locate same upon any of the unoccupied public lands of the United States. This was the only asset of the estate, and there were no debts, but there were certain heirs of the deceased who were in ignorance of the existence of this land claim. The law of Louisiana provided a public

administrator for such estates and required the parish court to grant administration to such administrator and to order the sale of assets to pay debts. In 1872, being forty-two years after the death of Simmons, such proceedings were had in the parish court that one David Magee was wrongfully and fraudulently appointed administrator of the estate and an order entered to sell the land claim, which was done, and the proceeds expended in paying the costs of administration, there being no other claims against the estate. The purchaser, who was a party to the fraudulent proceedings, located the claim upon certain lands in Wisconsin, and later, by purchase, these lands came into the possession of Harry R. Saul, a citizen of Pennsylvania. This was an action brought in the Circuit Court of the United States for the Eastern District of Pennsylvania by ten citizens of Louisiana, two of Mississippi and four of Texas, claiming to be the legal descendants of Robert M. Simmons, against said Harry R. Saul. Its object was to charge the defendant as former owner of the land in Wisconsin and compel him to account for the value of the lands, their rents and profits, and for damages resulting from the cutting of timber.

A demurrer to the bill was sustained in the court below and affirmed on appeal. On page 447 of the opinion the question in the case is stated as follows:

"The first and main ground of the demurrer in this case is, that the facts stated in the complaint show that the relief claimed by the complainants is barred by the judgment or decree of a court of competent jurisdiction; rendered in proceedings regular on their face, and which have not been attacked by any proceeding in that court, or in any appellate court. The bill alleged that the court

which rendered that judgment was without jurisdiction; that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act; that the judgment itself was obtained by a fraud upon the court; and that necessarily the pretended succession sale had in pursuance thereof, from which the appellee derived title to the lands with respect to which he committed the wrongs complained of, was illegal and void as to complainants, who, as heirs of Robert M. Simmons, deceased, are the equitable owners of said property. The pleadings, therefore, at the outset, present to us these two questions:

"(1) The validity of the judgment of the parish court of Washington parish ordering the succession sale of the unlocated land claim of Robert M. Simmons, deceased, and the legality of the sale thereunder, irrespective of any question of fraud.

"(2) As to the fraud by which it is alleged the judgment in question was procured."

An examination of the law of Louisiana was then made by the court, and the conclusion reached that the parish court had original and exclusive jurisdiction over the administration of such estates, as the bill showed that one to have been, and that the petition filed in the parish court contained a sufficient recital of facts to give the court jurisdiction over that particular estate. The opinion then takes up one by one the allegations of the bill and disposes of them adversly to the complainants. One contention of the bill was that as the law of Louisiana provided a public administrator for such estates, the appointment of a person other than such public administrator was void. On page 452 the court quoted from the case of *Comstock v. Crawford*, 3 Wall., 396, 403, to the effect that this was a matter for the consideration of the parish coirt, "and its action respecting them, however irregular, cannot

be impeached collaterally." It was further contended in the bill that as the law of Louisiana required ten days notice of the sale to be given, while as a matter of fact none was given, the sale was void. The opinion, however, on page 453, disposes of that contention by holding that this was at most an error to be corrected on appeal or avoided in a direct action of annullment but could not be made the grounds on which the decree of the court can be collaterally assailed. It was further contended in the bill that the fraud practiced on the Louisiana court rendered the judgment void. This was likewise overruled, the court holding, "that fraud could not be pleaded to an action in one state upon a judgment obtained in another." The summing up of the judgment of the court is in the following language:—

"The order of the parish court of Louisiana granting, letters of administration was a judicial determination of the existence of the necessary facts preliminary to them.

"The parish court had unquestionable jurisdiction of the intestate estate or succession of Simmons.

"Whether the person appointed administrator by the parish court was or was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed, was a matter to be considered by the court making the appointment, and its judgment thereon cannot be impeached collaterally."

A statute of Ohio provided that in any action in that state on a contract of insurance made therein with a foreign insurance company, service of process on the resident agent of such company shall be "as effectual as though the same were served on the principal."

Judgment was rendered in Ohio in an action against an Indiana insurance company the only service of process being upon its resident agent, there being no appearance by the company. This court held in the case of *The Lafayette Ins. Co. v. French*, 18 How., 404, that such judgment when sued on in Indiana was "entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States."

It is impossible to distinguish that case from the case at bar. There the statute became a part of the contract of insurance, and the company agreed that in case of an action on the contract, service of process on the agent should be considered service upon it. Here, the defendant as a part of the contract of loaning entered into with the plaintiff bank expressly constituted "any attorney at law in the United States or elsewhere" his agent to appear before any court of record and "waive the issuing and service of process, and confess judgment against" him.

In that case the contract provided an agent upon whom service of summons might be had. In the case at bar the contract provided an agent, with authority to waive the "issuing and service of summons" and confess judgment against the party conferring the authority. There, this court held that judgment to be a valid judgment against the party to the contract, and entitled to "full faith and credit." Here, the Nebraska court denied "full faith and credit" to this judgment and held that the party to the contract might defend against the judgment upon the sole ground that the plaintiff was not the real party in interest in the court in which the judgment was entered.

It is clear that the defendant in that case would

not have been heard to urge against the judgment that the plaintiff was not the holder of the contract of insurance at the time judgment was rendered in Ohio.

This judgment has the same force and effect as a judgment on adversary proceedings.

Snyder v. Critchfield, 44 Neb., 66.

Clearly then, if the defendant had appeared in person in the Ohio court and judgment had been rendered against him only after a contested trial, he could not now be heard to insist that the plaintiff in that action was not the holder of the note at the time judgment was rendered. This proposition would seem to be conclusive in this case.

In the Nebraska court all jurisdictional questions were settled beyond controversy in favor of the plaintiff. They were that the Court of Common Pleas of Seneca County, Ohio, being a court of general jurisdiction, had jurisdiction of the subject-matter of the action, and jurisdiction of the person of the defendant through the appearance of an attorney authorized to appear by virtue of a valid warrant of attorney executed and delivered by the defendant. All other questions were *quasi*-jurisdictional only, and were necessarily passed upon by the Ohio court. The warrant of attorney authorized a confession of judgment in favor of the holder of the note. The trial court before rendering judgment must have decided *that the plaintiff in the action was the holder of the note.* It would not have rendered judgment unless it had been made to so appear. Consequently its decision upon this question necessary to be decided was conclusive as against a collateral attack.

Respectfully submitted, CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

National Exchange Bank of Tiffin, Ohio,
Plaintiff in Error,
vs.
Solon L. Wiley,
Defendant in Error.
} No. 18,967.

In Error to the Supreme Court of the State of Nebraska.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Constantine J. Smyth,
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J. J. Boucher,
Attorneys for Plaintiff in Error.

Defendant in error suggests that warrants of attorney are strictly construed.

This means no more than that they are strictly construed when judgment is sought according to their terms. But it has never been suggested that judgments entered upon such warrants are to be strictly construed, or construed differently from other judgments. We have seen that in the case of *Snyder v. Critchfield*, 44 Neb. 66, a judgment on a warrant of attorney was construed as are judgments in other

actions. Therein it is said: "A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on here, as a judgment on adversary proceedings."

> "In an action on such judgment, payment of the debt defore judgment, that the foreign action was barred by the statute of limitations, or any other defense which applied to the original cause of action cannot be availed of. The judgment itself is conclusive against such defenses."

The defendant cites the case of *Spence v. Emerine*, 46 O. S. 433, as "the leading case in Ohio involving a construction of warrants of attorney such as this." That case differs from the case at bar in many essential particulars. That was a direct attack on the judgment by proceedings in error while in the case at bar the attack on the judgment is collateral. In that case, as stated by that court, "the power of attorney attached to the note in controversy, does not, in express language authorize a confession of judgment in favor of anyone, not even the payee," while in the case at bar the power of attorney attached to the note authorizes judgment to be confessed in favor of "the holder of this instrument." In that case the record before the court disclosed that E. S. Clark was the payee named in the note while judgment was confessed in favor of Andrew Emerine to whom the note had been transferred by delivery, while in the case at bar the record discloses that this plaintiff in error, National Exchange Bank, was named as payee, the judgment was confessed in favor of the National Exchange Bank and the National Exchange Bank brought the action on the judgment in the Nebraska court. At no place

in the record of the Ohio court does it appear that any person or corporation other than the National Exchange Bank ever had any interest in either the note or judgment.

In that case the case of *Clements v. Hull*, 35 O. S. 141, is cited to the effect that where the warrant of attorney, as in the case at bar, authorizes a confession of judgment in favor of the holder of the note, judgment may be executed in favor of an equitable owner and holder to whom the note has been transferred by delivery.

It is apparent then that the case of *Spence vs. Emerine* is not an authority in favor of the position of defendant in error. There the court reversed the judgment of the lower court because it appeared on the face of the record that it was only by implication that it could be held that the maker of the warrant of attorney had authorized judgment to be confessed against him, even in favor of Clark, the payee of the note, while judgment was confessed in favor of one Emerine. to whom the note had been transferred by delivery. It is clear beyond controversy that if the record in that case had shown that judgment had been confessed in favor of the person designated, as in the case at bar, the judgment of the lower court would have been affirmed.

Defendant in error at pages 17-20 of his brief sets up some suppositious cases, differing from the case at bar as much as it is possible for cases to differ, and then because such cases warrant the conclusion reached by the Nebraska court concludes that the judgment of the Nebraska court was correct. He refuses to allow any force or effect whatsoever to the judgment of the

Ohio court. He treats every question as an open one, just as though the action in the Nebraska courts was one on the note instead of on the judgment entered on the note. He says—"Hence, if the plaintiff was not the holder of the note, the attorney was not Wiley's agent and could not give the court jurisdiction over him."

Plaintiff in error in its first brief has shown the fallacy of this contention, but a further consideration of the subject in this connection may not be without profit.

The validity or invalidity of the warrant of attorney was necessarily the first question to be considered by the Ohio court in the action on the note. If the warrant of attorney should prove to be invalid because of the signature thereto being a forgery, or for any other reason, then the defendant would not be in court; the court would have no jurisdiction over his person and consequently would not have jurisdiction to render judgment against him. And although the court should adjudge the warrant of attorney to be valid the defendant would not be estopped to assert the contrary in any proceeding, collateral or otherwise, and that consequently the judgment was void. This would be one of the two jurisdictional questions which may be enquired into at any stage of any proceeding, and any fact tending to show the invalidity of the warrant of attorney is always competent to be considered.

But the Ohio court adjudged the warrant of attorney to be valid, and its validity has been at all times conceded by the defendant. Consequently every jurisdictional question which can be enquired into in a collateral proceeding has been settled in favor of the judgment.

The validity of the warrant of attorney having been found by the Ohio court, and the defendant being before the court by attorney, the next question necessarily presented for the consideration of the court was whether or not the plaintiff was the holder of the note. If the plaintiff was found not to be the holder of the note, then the action should be dismissed, not because, as contended here by the defendant, the court did not have jurisdiction over the person of the defendant, but because the plaintiff was not the owner of the claim sued upon; was not the real party in interest; was not the person in whose favor judgment was authorized to be confessed.

If, however, the plaintiff was found to be the holder of the note then he was entitled to judgment against the defendant for the amount found to be due.

This was an allegation necessary for the plaintiff to make and prove, and a question necessary for the court to pass upon. This was no more of a jurisdictional question than was the question of the amount due from the defendant. The court did pass upon it and did decide that the plaintiff was the holder of the note and entered judgment accordingly. As we have seen, every authority is to the effect that such judgment is conclusive against collateral attack. That the court having jurisdiction over the person of the defendant its judgment on other matters, whether right or wrong, is conclusive.

The defendant suggests that it would be competent for him to show that a butcher for instance, and not an attorney at law, confessed judgment against him.

This is by no means conceded. In the case of

Teal v. Yost, 128 N. Y. 387, heretofore cited, it is said that "if it appears by the record that the defendant appeared by attorney the defendant may disprove the authority of such attorney to appear for him" by showing "that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon." Clearly, however, he would not be allowed to show in contradiction of the record that the person who exercised the power of attorney was not an attorney at law.

The defendant likewise suggests that if a power of attorney by A to sign his name to a note payable to C be executed by signing a note payable to D the maker is not liable. This may be true. But suppose on the other hand that the note is made payable to C in accordance with the power of attorney, and there is an adjudication by a court possessing jurisdiction over both the subject matter of the action, and the parties, as in the case at bar, to the effect that C is C, clearly the contrary cannot be shown in a collateral proceeding.

The defendant at page 200 of his brief says, that should the contention of the plaintiff herein be sustained, that then by fraudulent practices, successive judgments in favor of many different persons could be obtained on one instrument and that "the richest man to be found anywhere could be financially ruined by obtaining his name to a note like this."

The defendant is needlessly alarmed. "The richest man to be found aywhere" would have no difficulty in going into the courts, wherein such judgments had been rendered, and procuring them to be set aside. Judgments on warrants of attorney, like other judgments,

are subject to direct attack in the courts where rendered, and the books are full of cases where such judgments have been attacked in direct proceedings by appeal or error.

If there is any force to the defendant's suggestion there is nothing now to prevent the holder of such an instrument from himself obtaining such judgments in many different courts. That would not be more difficult, nor indeed so difficult, as for different persons to obtain such judgments. We well know that when a judgment is rendered upon an instrument, that that instrument is surrendered up and cancelled, and effectually put out of circulation. There is not an instance on record of the fraudulent practices suggested.

On pages 26 and 27 of his brief, the defendent reviews the case of *Simmons v. Saul.* 138 U. S. 439. Therein he says—"The court had jurisdiction over the thing. Thereupon, having acquired jurisdiction over the thing, its subsequent acts in disposing of it were at most quasi-jurisdictional. And such was the ground of the court's decision."

The identical contention of the plaintiff herein. The Ohio court having jurisdiction over the subject matter of the action and having acquired jurisdiction over the person of the defendant by virtue of a valid warrant of attorney, produced in court by the plaintiff, "its subsequent acts in disposing of it were at most quasi-jurisdictional."

The Defendant's Fourth Point.

At page 29 of the defendant's brief he says: "When the plaintiff offered the transcript of its judgment in evidence (Ex. 1) the defendant made the following

objection (p. 20): 'The defendant objects to the introduction of Exhibit 1, because Exhibit 1 is not responsive to the pleadings. The petition alleges a judgment against Wiley. Exhibit 1 purports to show a joint judgment against the Wiley Construction Company and S. L. Wiley. Such a judgment cannot be made the basis of a separate action against one of the named debtors.'"

This statement is erroneous. The petition alleged a recovery of a judgment against *Wiley and Wiley Construction Company*. (Record 3). The transcript of the judgment shows a judgment against *Wiley and Wiley Construction Company*. Hence the objection tnat "Exhibit 1 is not responsive to the pleadings" is not well taken.

The Defendant Waived Any Defect of Parties.

The defect of parties defendant, if such there was, appeared on the face of the petition. By failure to demur for that reason the defendant waived the defect. Such are all authorities.

> "The objection that there is a defect of parties (which is in effect a non-joinder of parties) must also be taken by demurrer at the proper time, when the deficiency appears upon the face of the record, or it will be waived. And the rule applies equally whether the defect is one of parties plaintiff or of parties defendant."
>
> *6 Encyc.* Pl. & Pr., 375.
>
> Citing, *Beeler v. Larned*, First Nat. Bank, 34 Neb., 348.

In that case it is said, "Objection is made that the action in form should have been against all the signers

of the note and not against one of them alone. This is true. An action upon a joint obligation under the Code should be brought against all the joint obligors. It is not necesessary as at common law, however, to obtain service upon all, but judgment may be rendered against such as can be served. The defect, however, appeared on the face of the petition, and a demurrer for a defect of parties defendant should have been interposed. As the plaintiff (defendant) failed to do this, the defect is waived."

In *Castile v. Ford*, 53 Neb., 507 it is said, "A defect of parties plaintiff, appearing on the face of the petition, must be objected to by demurrer on that ground, or it will be waived."

In any event the defendant is not in position to urge this point. The trial court ruled against the contention.

By not assigning the ruling as error he must be deemed to have acquiesced in it. True he urged the contention in argument in the Nebraska Supreme Court, but that court ignored it. It would, indeed, be a startling proposition that a judgment of a trial court should be affirmed, because perchance in the course of the trial that court erred in a ruling on a point of practice.

Respectfully submitted,

CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
J. J. BOUCHER,
Attorneys for Plaintiff in Error.

Omaha, Neb., October 4, 1904.

IN THE

SUPREME COURT

— OF THE —

UNITED STATES

October Term, 1904

NATIONAL EXCHANGE BANK OF TIFFIN, OHIO,
Plaintiff in Error,

vs.

SOLON L. WILEY,
Defendant in Error.

No. 53

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

Having carefully examined the opinion of the Honorable Court, we think that, with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff in error on the ground that:

I. The finding of the Nebraska court that the plaintiff was not the real party in interest—the holder of the note—when the judgment was rendered in the Ohio court, is not a finding that that court did not have jurisdiction over the person of the judgment debtor.

The judgment of the Nebraska court in this case is affirmed by this court because it is assumed, that the finding of that court that the plaintiff in the Ohio court was not the holder of the note when judgment was rendered thereon pursuant to the terms of the warrant of attorney, established want of jurisdiction in that court over the person of the judgment debtor. If such finding establishes such want of jurisdiction then there can be no question but that the judgment of the Nebraska court was properly affirmed. The jurisdiction of any court by which a judgment is pronounced over the subject matter of the action and the person of the judgment debtor may be questioned in a collateral proceeding in another state. As to all other questions the judgment is conclusive.

Thomson vs. Whitman, 18 Wall, 457. Citing *Mills vs. Duryee,* 7 Cranch, 484. 1 *Story Commentary on the Constitution,* Sec. 1313. 1 *Kent Commentaries* 281.

To the same effect see *Simmons vs. Saul,* 138 U. S., 459.

"A judgment entered in pursuance of a warrant of attorney in a state in which such judgments are authorized, has the same force, when sued on here, (Nebraska) as a judgment on adversary proceedings."

Snyder vs. Critchfield, 44 Neb., 66 (1895).

To the same effect see *Teel vs. Yost,* 128 N. Y., 387.

The plaintiff in error however, contends that the finding of the Nebraska court that the plaintiff was not the real party in interest—the holder of the note—when the

judgment was rendered in the Ohio court is a finding as to the merits of the original cause of action in that court and is not a finding that that court did not have jurisdiction over the person of the judgment debtor.

In Anderson's Law Dictionary, subject "Merits" it is said that merits "Embraces more than the questions of law and of fact involved; all that a party may of right claim in reference to his case." (*Blakeley vs. Frazier*, 11 S. C., 134. *Dill vs. Moon*, 14 S. C., 339.)

"The real or substantial grounds of action or of defense, in contradiction to some technical or collateral matter raised in the course of the suit."

"In ordinary acceptation, the abstract justice of a case, without regard to technical or arbitrary rules of law. In legal signification, the combined questions of law and of fact presented by the pleadings in the case. But in a given case, may mean the strict legal rights of the parties, as distinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court." (*St. John vs West*, 4 How. Pr., 331 Selden J.)

Whenever a judgment is rendered in any action in favor of one of the parties against another, there are two questions on the merits necessarily adjudicated. One is that a liability exists against the judgment debtor; and the other is that that liability exists in favor of the judgment creditor.

Clearly in a collateral action the judgment debtor cannot question the finding of the court as to his liability,

and it would seem equally clear that he cannot question the finding of the court that that liability exists in favor of the judgment creditor.

The conclusiveness in collateral actions of such a finding—the right of a particular plaintiff to prosecute a particular action—was before the court in *Richtmeyer vs. Remsen*, 38 N. Y., 206, in which case it is said:

"In an action against a sheriff, for the escape through his negligence, of a judgment debtor, against whose person an execution had issued, and under which he was held in custody, the defense, that the plaintiff in the former suit was not the proper party to bring the action, is not available. The recovery of the judgment in that case is conclusive as to the right of the plaintiff thereto, upon the parties in this action."

Practically the same question was before the court in *Reinach vs. Atlantic, etc. R. R. Co.*, 58 Fed. 33, and it was said by Mr. Justice Brown, now of this court:

"There is a clear distinction between those facts which involve the jurisdiction of the court over the parties and the subject-matter, and those *quasi* jurisdictional facts, without allegation of which the court cannot be set in motion, and without proof of which a decree should not be pronounced. In the absence of the former the judgment of the court is void, and may be attacked in collateral proceedings, while in respect to the latter it is conclusive, and cannot be questioned except on review."

That the findings of courts in judgments by confession are conclusive upon the parties in collateral proceed-

ings is the holding of the court in the case of *Teel vs. Yost*, 128 N. Y., 387. That was an action upon a judgment of a Pennsylvania court entered by confession pursuant to a warrant of attorney. The force and effect and validity of such judgments were examined at some length by that court and the conclusion was arrived at that, given a valid warrant of attorney, such judgments were as conclusive upon the parties as judgments entered in adversary proceedings.

Among other things it is said therein:

"The appearance by an attorney, under a written power from the party, authorizing his consent to a judgment, is the legal equivalent of the process and proceedings usually taken in an action *in invitum*."

"If the court in Pennsylvania had jurisdiction of the person of the defendant and the subject-matter of the action, whatever course it might afterwards have pursued in determining the rights of the parties, they cannot be heard now to relitigate the questions considered in that action. As to such matter, upon the principle of *res adjudicata* the judgment is binding and conclusive upon the parties."

"The rule laid down in *Shumway vs. Stillman*, 6 Wend., 458, was, 'that the judgment of a court of general jurisdiction, in any state in the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: First, if it appears by the record that the defendant was not served with process, and did not

appear in person or by attorney, such judgment is void; and second, if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him.' This case has been quite uniformly cited and approved as a leading case in subsequent cases in this state. Under the authority of this rule, we do not see how the defendant could have been seriously prejudiced by the want of notice of the proceedings leading to the judgment, as it was competent for him to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon any one to appear for him and confess judgment thereon; but no such proof was given or offered upon the trial. The presumption, therefore, is that the note was the genuine obligation of the defendant and gave actual authority to the prothonotary, or any other attorney, to consent to the judgment authorized by it."

"It is, and was by the laws of Pennsylvania, a valid, binding adjudication, *in personam*, against the defendant herein, and entitled, by the laws of the said state, to have the same faith and credit given to it as if it had been entered upon a verdict after a trial in which the defendant had appeared."

"We have already stated that in judgments by confession neither process, declaration, nor personal appearance are anywhere required in order to authorize the rendition of a valid personal judgment by a competent court. The appearance of the agent appointed by the party in his warrant of attorney upon the entry of the judgment con-

stitutes, to every intent and purpose, an appearance by the party, and gives the court jurisdiction to render a judgment to the effect authorized against his principal."

" 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have had actual notice of them.' "

" 'How or when this peculiar security for a debt, authorizing a creditor, as it were, *per saltum*, to sign a judgment and issue an execution without even issuing a writ, was first invented, does not appear; but it has now become one of the most usual collateral securities on loans of money.' "

"This brief historical statement of the condition of the law on the subject in this state will have failed in its purpose if it does not show that heretofore the filing in court of a warrant of attorney, authorizing the confession of a particular judgment, gave the court jurisdiction, over the person of the party executing it, to adjudicate according to its regular practice upon the subject embraced in the warrant."

"Given a valid warrant of attorney in either state, the rest is matter of form, to be regulated by the laws of the respective states where the cause of action arises."

The plaintiff in error has at all times conceded the full force and effect of the holding of this court in the case of *Thomson vs. Whitman*, 18 Wall, 457, 471, cited in the opinion in this case. In that case it was held competent

to show by evidence in a collateral action that in an action *in rem,* a sloop which had been condemned by two justices of the peace because used in raking clams in violation of law, was not seized in the county in which the condemnation proceedings were had and that consequently the justices did not have jurisdiction over the subject-matter of the action. Just as it may be shown by evidence in a collateral action in which a decree of foreclosure of a mortgage on real estate is drawn in question, that the real estate was not situate in the district in which the decree was rendered, for the purpose of showing that the court rendering the decree did not have jurisdiction over the subject-matter of the action. But clearly, evidence in such a case that in the foreclosure action the plaintiff was not the holder of the mortgage or that there was nothing due, would be inadmissable because such facts would not tend to establish want of jurisdiction in the court rendering the decree but would instead go to the merits of the original cause of action. So in *Thompson vs. Whitman.* If the contention there had been, not that the sloop was not seized in the county where the justices sat, but instead that it was being used in codfishing instead of being used in raking clams, clearly this would have involved a question on the merits only, and not a question involving the jurisdiction of the court and just as clearly a finding to that effect would not have rendered the judgment subject to collateral attack. That would have made the case of *Thomson vs. Whitman* identical with the case at bar, and identical with the case of *Simmons vs. Saul,* 138 U. S., 439, wherein it was held that it could not be shown in a collateral action in another state that the person to whom letters of admin-

istration were issued was not the person to whom the statute required such letters to be issued.

It is clear that the court in *Thomson vs. Whitman* based its conclusion wholly upon the finding that the sloop was not seized in the county where the case was heard by the justices and did not consider as jurisdictional the finding that no clams had been taken within that county on the day of the seizure. An examination of the statute of New Jersey under which the sloop was seized, was made by the court and the conclusion announced as follows:

"From this it appears that the seizure must be made in a county, and that the case can only be heard by justices of the county where it is made—'two justices of the peace of the county where such seizure shall have been made.' The seizure in this case, as specially found by the jury, was not made in Monmouth County, but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction, and the record had no validity."

It will thus be seen that the case of *Thomson vs Whitman went to the very existence of the authority itself* and not, as in the case at bar, *to an error of the court in exercising that authority.* Here it is admitted that the Ohio court had jurisdiction over the subject-matter of the action, and that the warrant of attorney authorizing the attorney at law "to appear and waive the issuing and service of process, and confess judgment" was valid and that a cause of action existed against the judgment debtor for the amount of the judgment. Opposed to this is simply the contention that the attorney at law who appeared, and the

court in which he appeared were both mistaken in a question involving the merits of the action, to-wit: That the liability found to exist from the defendant existed in favor of that particular plaintiff.

If the contention and finding in this case had been that the warrant of attorney was a forgery then a case like *Thomson vs. Whitman* would have been made out. Such a contention and such a finding would have gone to the *very existence of any authority in the Ohio court to adjudicate with reference to the rights of the defendant.* This was the holding of the court in *Teel vs. Yost,* 128 N. Y., 387, a case identical with the one at bar, wherein it is said that it would be competent for the judgment debtor "to show in defense of this action that the power of attorney upon which the judgment proceeded was a forgery, and conferred no authority upon anyone to appear for him and confess judgment thereon;" but that inasmuch as no such proof was offered the judgment creditor was entitled to enforce his judgment.

In *Elliott vs. Peirsol* 1. Pet. 328, 340, cited with approval in *Thomson vs. Whitman,* this court said:

"When a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court."

In *Simmons vs. Saul,* 138 U. S., 454, it is said, quoting with apporval from *McNitt vs. Turner,* 16 Wall., 366: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice,* can be impeached collaterally only for fraud. In all other re-

spects it is as conclusive as if it were irreversible in a proceeding for error."

In the case at bar it is conceded that when the Ohio judgment was rendered there was a cause of action existing against the defendant on the note for the amount of the judgment. It is likewise conceded that the warrant of attorney authorizing any attorney at law "to appear before any court of record and waive the issuing and services of process and confess judgment" was duly executed and delivered. Clearly upon such instrument being presented, it was competent for that court to determine in whose favor that cause of action existed and in determining that question it cannot be considered that it was thereby and then determining that it either had or had not jurisdiction over the person of the defendant. The production of the warrant of attorney and the appearance of the agent named therein brought the defendant before the court. The court thus having jurisdiction over the person of the defendant and also jurisdiction over the subject-matter of the action, then, under the authority of this court its judgment that the plaintiff was the holder of the note, is binding in every other court.

Wherefore, upon the foregoing grounds, this plaintiff in error and petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause.

CONSTANTINE J. SMYTH,
THOMAS D. CRANE,
JOHN J. BOUCHER,
Attorneys for Plaintiff in Error and Petitioner.

I, John J. Boucher, of counsel for the plaintiff in error herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well-founded, and the same is not interposed for delay.

John J. Boucher

FILE COPY.

FILED
MAR 19 1904
JAMES H. McKENNEY,
Clerk

18967

Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

No. 816. 53.

NATIONAL EXCHANGE BANK OF TIFFIN OHIO,
Plaintiff in Error,
vs.
SOLON L. WILEY,
Defendant in Error.

Brief for Defendant in Error.

IN ERROR TO THE

Supreme Court of Nebraska.

JAMES H. McINTOSH,
Attorney for Defendant in Error.

18967

Supreme Court

OF THE

United States,

OCTOBER TERM, 1903.

No. 316.

NATIONAL EXCHANGE BANK,
OF TIFFIN, OHIO,
Plaintiff in Error,

vs.

SOLON L. WILEY,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF THE ISSUES.

MAY IT PLEASE THE COURT,—

This is a writ of error to the Supreme Court of the State of Nebraska, to review a judgment of that Court affirming a judgment of the trial Court involving the validity of a judgment of the Court of Common Pleas for Seneca County, Ohio, on the ground that the

Nebraska Court failed to give full faith and credit to the judgment of the Ohio Court.

This suit was brought by the Bank against Wiley in the District Court for Douglass County, Nebraska, upon an alleged judgment plaintiff claimed it had recovered against Wiley in the Court of Common Pleas for Seneca County, Ohio. The defendant interposed several defenses, all of which the Court excluded on the trial except the single question as to whether or not the Ohio Court, in which the plaintiff's judgment was alleged to have been recovered, had jurisdiction to to render a judgment against Wiley as alleged. This question of jurisdiction the Court submitted to the jury on the evidence, under appropriate instruction, and the jury returned a verdict for the defendant, upon which judgment was duly entered.

The Ohio Judgment on a Cognovit Note.

The alleged judgment of the Ohio Court was founded upon the following note (Exhibit A. p. 82):

"$10,000.00 TIFFIN, OHIO, Ap'l 26, 1884.

"October 1, 1884, after date, for value received, we jointly or severally promise to pay the National Exchange Bank, or order, at its office in Tiffin, Ohio, Ten Thousand Dollars with 8 per cent interest after maturity. And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above obligation becomes due, and waive the issuing and service of process, and confess judgment against us, or any or either of us, in favor of the holder of this instrument for the amount then appearing due together with the cost of suit, and thereupon to release all errors, and

writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us.

"WILEY CONSTRUCTION CO. (SEAL)
"S. L. WILEY, Pres't (SEAL)
"S. L. WILEY (SEAL)"

Said note is indorsed on the back as follows:

"45170 May 9, 1887. Paid on the within $6311.75."

This note was due October 1st, 1884. Under date of May 9th, 1887, it bore the endorsement of a payment of $6,311.75, and yet, on the 31st day of July, 1899 (p. 81) Lutz & Lutz, Attorneys for the Tiffin National Bank, filed a petition in the Court of Common Pleas of Seneca County, Ohio, in the name of the National Exchange Bank of Tiffin, Ohio, against Wiley Construction Company and S. L. Wiley, on said note, and on the same day, July 31st, 1899, John Bender assumed to enter the appearance of the defendants and to answer for them, confessing judgment for the amount the plaintiff wanted him to, and releasing error, and on the same day, July 31st, 1899 (p. 83) the following entry was made in the Journal of said Court of Common Pleas of Seneca County, Ohio, to wit (p. 83):

"National Exchange Bank of Tiffin, Ohio, Plaintiff, vs. Wiley Construction Company and S. L. Wiley, Defendants. } Cognovit

"This day came the plaintiff by its attorneys; also appeared in open court, John Bender, an attorney at law of this court, and by virtue of the warrant of attorney annexed to the note attached to the petition in said cause, shown to have been duly executed by said defendants, entered the appearance of said defendants, and waived the issuing and service of process in

this action, and confessed a judgment on said note against said defendants, and in favor of said plaintiff, for eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of principal and interest due on said note, and for the costs taxed and to be taxed, and released and waived all exceptions, errors and right of appeal in the premises.

"It is therefore considered that said plaintiff recover of said defendants the sum of eleven thousand, four hundred and nineteen dollars and sixty-eight cents, being the amount of said note with interest computed at 8 per c nt per annum, from the 9th day of May, A. D., 1887, and also its costs herein expended taxed at $6.50."

Three days after said judgment entry was made in Ohio the plaintiff commenced this suit in Nebraska.

It will be noticed, said judgment purports to have been rendered in favor of the plaintiff and against the defendants, Wiley Construction Company and S. L. Wiley, pursuant to the appearance and confession of the defendants entered in said cause by one John Bender, Attorney at Law. This suit was brought in Nebraska against Wiley alone, his co-judgment debtor, if there was a judgment, not being made a party defendant.

The Defense.

In the Nebraska Court, the defendant, among other defenses, answered as follows (14):

1. That said defendant denies that the said plaintiff is or was a corporation, and denies each and every allegation in the plaintiff's petition contained.

2. This defendant further answering says that on the 26th day of April, 1884, Wiley Construction Company, as principal, signed a promissory note for $10,000, payable to the order of the National Exchange Bank. due October 18th, 1884, with eight per cent. interest after maturity; that on said 26th day of April, 1884, the name, S. L. Wiley, was signed to said note; that there never were any other signers to said note; that it was understood and agreed between all the parties interested in said note that if any liability at all should accrue to S. L. Wiley by reason of the premises, said liability should be, and should continue to be, secondary, and that of, to wit, indorser; that no consideration ever accrued to said S. L. Wiley, for anything done in or about said note; that on, to wit, the 2nd day of March, 1885, the Tiffin National Bank purchased, received, and became the holder of said note, thence has been and still is the holder thereof, and said plaintiff has never been the holder thereof, or in any way interested therein; nevertheless, this defendant is informed and believes, and upon information and belief states, that said note forms the basis of the pretended judgment upon which said plaintiff now brings this suit.

6. This defendant further says, upon information and belief, that whatever judgment, if any, purports to have been rendered in Seneca County, Ohio, upon said note, was against the signers thereof, jointly, and not against them severally, nor against them one as principal, and the other as indorser or surety.

Wherefore the said plaintiff ought not now be permitted to maintain this suit.

The Trial.

On the trial, the only defense the Court entertained was the defense that the Ohio Court had no jurisdiction over the defendant in the case in which the judgment was alleged to have been rendered.

This defense was presented pursuant to paragraphs one and two of the answer above quoted, the Trial Court ruling that if the plaintiff in the Ohio suit was not, at the time the suit was brought, the holder of the note in question, then the attorney-at-law assuming to enter the defendant's appearance and confess judgment against them was not their agent. The question as to whether or not the plaintiff in the Ohio suit was the holder of the note was duly submitted to the jury upon proper instructions, and a verdict returned for the defendant.

In reviewing the judgment, the Supreme Court of Nebraska summarized its views in the third paragraph of the syllabus, which, according to the practice in that State, is written by the Court, as follows (p. 87):

"In an action on a foreign judgment taken under a warrant of attorney authorizing any attorney at law to appear in any court of record, and confess judgment against the makers of a certain note, in favor of the holder thereof, *Held* (1) That such warrant was not a general authority to appear and confess judgment, in any action instituted on the note, but was limited to the confession of a judgment in favor of the holder; (2) That the defendant was not estopped by the judgment to deny that the plaintiff was the holder of the note when such judgment was confessed; (3) That a judgment confessed in favor of one who at the time was not the holder of the note, was void for want of jurisdiction."

BRIEF OF THE ARGUMENT.

I.

Answer to the Plaintiff's First Point.

The plaintiff's first point is (Brief, p. 14), that the "Answer does not state a defense to the plaintiff's petition, but instead confesses same."

The several defenses in the answer are not separately stated and numbered, but the first paragraph of the answer is a general denial.

The second paragraph alleges that ever since March 2, 1885, the Tiffin National Bank, and not the plaintiff, has been the holder of said note. This paragraph of the defense expressly put in issue the question as to whether or not the plaintiff in the Ohio suit was the holder of the note at the bringing of that suit, and therefore put in issue the question as to whether or not John Bender was Wiley's agent to enter his appearance and confess judgment; for Wiley only appointed an agent as between him and the holder of the note, and not as between him and any third person.

The sixth paragraph of the answer, too, wherein it is stated in substance that if there was a judgment in Ohio it was a joint judgment against Wiley and the Wiley Construction Company, and therefore this joint judgment could not form the basis of a separate suit against Wiley alone, stated a good defense to the plaintiff's petition.

II.

Answer to the Plaintiff's Second Point.

The plaintiff's second point is (Brief, p. 17), "That in any view of the case there is no evidence in support of the defendant's contention that the plaintiff was not the holder of the note in the Ohio Court."

The record shows that as far back as March, 1885, the National Exchange Bank sold and delivered this note to the Tiffin National Bank, of Toledo, Ohio, which ever since has been the owner and holder thereof.

The charter of the National Exchange Bank expired March 1, 1885 (Ex. A p. 58). At a meeting of its Board of Directors held February 24, 1885, the following business was transacted, as shown by the record of the meetings of the Board of Directors of said Bank, to wit (p. 67):

"WHEREAS the corporate existence of this Bank expires by limitation March 1st, and will be succeeded by the Tiffin National Bank,

"On motion the full board of directors of this bank were appointed to confer with a like committee from the Tiffin National Bank, and agree upon a value to be placed on the *transferable assets* of this bank, including bank building, and U. S. Bonds to be sold to Tiffin National Bank."

The Tiffin National Bank was a banking corporation formed about the time the charter of the National Exchange Bank expired, but with stockholders substantially the same as the stockholders of the National Exchange Bank (p. 44).

The Committee appointed at the above February 24, 1885, meeting of the Board of Directors of the National

Exchange Bank, reported at the meeting of said Board held March 2, 1885, as follows (p. 68):

"The committee appointed at the last regular meeting, presented the following

REPORT.

"TO THE DIRECTORS OF THE NATIONAL EXCHANGE BANK OF TIFFIN, OHIO:

"The committee appointed by you to confer with a like committee appointed by the board of directors of the Tiffin National Bank, and determine a value to be placed on the assets of the National Exchange Bank, to be transferred to the Tiffin National Bank, beg leave to report that they have fixed upon the following valuation:

* * * * * *

Net worth of discounts as per schedule.....$160,871.38

* * * * * *

"On motion the report of the committee was received, and the valuation of assets adopted by this Board, and the Cashier directed to execute a warranty deed for the bank building, to the Tiffin National Bank and deliver the same, together with all the other assets described in the above report to the said Tiffin National Bank."

At the time the above valuation was made, this Wiley note was one of the discounts of the National Exchange Bank (pp. 28, 47, 48, 49, 70).

After the transfer and delivery of the assets as directed at said meeting of March 2, the Directors of the plaintiff held a meeting on March 3, attended by the full board, the record of which is taken from the minute book of the plaintiff's directors, and is in part as follows (p. 69):

"Minutes of last regular and intervening special meetings were read and approved.

"The corporate existence of this bank having expired at the close of business February 28, 1885, by limitation, it then went into liquidation, the available assets having been transferred to the Tiffin National Bank."

This Wiley note, from the time of the above transfer, was in the vaults of the Tiffin National Bank (pp. 50, 73), in the custody of said bank, and especially under the management and control of Mr. Chamberlain, its Cashier (p. 73).

Very shortly before the 31st day of July, 1899, Mr. Chamberlain, Cashier of the Tiffin National Bank, took this note out of the vaults of the Tiffin National Bank and delivered it to Lutes & Lutes, attorneys for the Tiffin National Bank, for suit (p. 33).

Mr. Chamberlain pretends that in giving this note to the attorneys of the Tiffin National Bank for suit, he was acting as Cashier of the National Exchange Bank, under the direction of the Board of Directors of that Bank. He also says, however, that the Directors of the National Exchange Bank gave him this direction a few days before July 31, 1899, but during the entire year 1899 there never was a meeting of the Directors of the National Exchange Bank. Since 1885 there never had been an election of the Directors of the National Exchange Bank. Of the five men who were Directors of the Bank in 1885, two of them have since deceased, and the survivors of them were all Directors of the Tiffin National Bank.

From these facts the jury concluded that the plaintiff was not the holder of the Wiley note at the time of the entry of the judgment which forms the basis of the plaintiff's claim. Hence the Court acquired no jurisdiction over Wiley, for Wiley by signing the note merely appointed an attorney to act for him as between him and the holder of the note. He

did not appoint an attorney to act for him as between him and some one who was not the holder of the note. Therefore, if the plaintiff was not the holder of the note the attorney was not Wiley's agent.

III.

Answer to the Plaintiff's Third Point.

The Plaintiff's third point is (Brief p. 19),—that "Under the full faith and credit clause of the Constitution of the United States the judgment of the Ohio Court is conclusive that the plaintiff therein was the holder of the note."

1. The Question of the Jurisdiction of the Court, and the facts upon which Jurisdiction is based, may always be questioned, whether the findings formally recite that the Court has acquired jurisdiction or not.

Thompson v. Whitman, 18 Wall, 457, is the leading case on this subject. There Whitman sued Thompson in an action for damages for seizing and carrying away the plaintiff's sloop. Thompson justified by averring that at the time of the seizure Whitman was engaged in unlawfully gathering clams with his sloop "within the limits of the County of Monmouth," and that the defendant as Sheriff of said County "seized the sloop within the limits thereof and informed against her before two justices of the peace of said county by whom she was condemned and ordered to be sold. Whitman, in answer to this defence, denied that his sloop was seized within the County of Monmouth, thus challenging the jurisdiction of the justices, as well as the right of the defendant to make seizure."

On the trial, Thompson produced the justices record "which stated the offence as having been committed, and the seizure as made within the County of Monmouth."

Mr. Justice Bradley delivered for the court an exhaustive opinion, stating the question in the case and the conclusions of the court thereon, as follows:

"The main question in this case is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It states with due particularity sufficient facts to give the justices jurisdiction under the law of New Jersey. Could that statement be questioned collaterally in another action brought in another state? * * *

"It must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it.

"The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent. * * *

"On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the Fourth Article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself. * * *

"The seizure in this case, as specially found by the jury, was not made in Monmouth County; but the justices who tried the case were justices of that county. Consequently the justices had no jurisdiction and the record had no validity."

Thompson v. Whitman has been cited many times, and approved as conclusive of the right collaterally to question the jurisdiction of the court, notwithstanding the recitals of the record.

Knowles v. Gas Light Co., 19 Wall., 58.
Hall v. Lanning, 91 U. S., 160.
Penoyer v. Neff, 95 U. S., 714.
Cole v. Cunningham, 133 U. S., 107.
Simmons v. Saul, 138 U. S., 439.
Thormann v. Frame, 176 U. S., 356.
Bell v. Bell, 181 U. S., 175.

The right to question collaterally the jurisdiction of the court over the subject matter of the suit or over the parties affected by it, necessarily involves an inquiry into the facts by virtue of which it is claimed jurisdiction obtained. If jurisdiction over the subject matter of the action is questioned, then the determination of that question involves an inquiry into the facts by virtue of which it is claimed the court got jurisdiction over the subject matter. Or if the courts jurisdiction over the parties is questioned, then the determination of that question involves an inquiry into the facts by virtue of which it is claimed the court got

jurisdiction. The right to question collaterally the jurisdiction of the court opens inquiry into all the facts upon which the jurisdiction is based. To this effect are all the federal decisions.

In *Simmons v. Saul, 138 U. S.*, 439, the court said, at page 448: "It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter of the parties affected by it, nor into the facts necessary to give such jurisdiction."

In the late case of *Thormann v. Frame, 176 U. S.* 350, the right to inquire into the facts necessary to give jurisdiction was referred to by the court as "thoroughly settled."

In the still later case of *Bell v. Bell, 181* U. S., 175, the court not only followed the established rule that "the recitals in proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted," but also, after inquiring into the truth or falsity of these recitals, approved the findings of the trial court that the recitals were false, and that the divorce in question was void.

In this case, therefore, it was not merely proper for the defendant collaterally to question the jurisdiction of the Ohio court, but also to question every fact essential to that court's jurisdiction. And if on the trial it should appear that in all the facts necessary to constitute jurisdiction a single essential fact was wanting, then the Court must find the Ohio court was without jurisdiction, and for that reason its judgment a nullity.

2. That the Plaintiff in the Ohio suit was the holder of the Wiley note, was a fact essential to the Court's jurisdiction. If the Plaintiff was not the holder, then the Ohio Court had no jurisdiction.

(*a*). The warrant of attorney contained in the note was as follows (p. 70):

"And hereby authorize N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after the above note becomes due and waive the issuing and service of process, and confess judgment against us or any or either of us, *in favor of the holder of this instrument*, for the amount then appearing due together with costs of suit, and thereupon to release all errors, and writs of errors, and waive all right to appeal, and stay of execution, in our behalf or in behalf of either of us."

By this warrant of attorney, the attorney's authority was limited to a confession of judgment "in favor of the holder of this instrument." He could not confess judgment in favor of one who was not the holder.

(*b*) These warrants of attorney are strictly construed.

Warrants of attorney such as this are unknown to Nebraska jurisprudence. Judgment entered upon them in the Courts of other States, however, are by comity and by virtue of the federal constitution there recognized as valid. But neither comity nor the constitution requires the Nebraska courts to give a more liberal construction to the judgments of courts of other states or to warrants of attorney by virtue of which they are entered than do the courts of the state where the judgments were rendered.

In Ohio, these powers of attorney have been recognized and enforced; but the judgments rendered in pursuance of them have never been held good except when it was made clearly to appear that the authority

contained in them had been strictly pursued. Nor has the warrant been held to confer any authority not strictly within the letter of the language used.

Spence v. Emerine, 46 O. S., 433, is the leading case in Ohio involving a construction of warrants of attorney such as this. And it was there laid down as "an established principle that an authority given by warrant of attorney to confess judgment against the maker of the note must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties. Cushman v. Welsh, 19 Ohio St., 536; Cowie v. Allaway, 8 T. R., 257; Henshall v. Matthew, 1 Dowling's Pr. Cas., 217; Foster v. Clagget, 6 Dowling's Pr. Cass., 524; The Manufacturers' and Mechanics' Bank of Philadelphia v. St. John, 5 Hill, 497. In all cases of special agency, an agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. * * * The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction.

"In accordance with the view which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on, did not authorize a confession of judgment in favor of defendant in error, and there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the court of common pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him."

It will be noticed that the judgment of the lower court in the above Ohio case was reversed because the judgment was void, the trial court "having acquired

no jurisdiction." The want of jurisdiction in that case arose from the fact that the warrant of attorney did not give express authority to confess judgment in favor of the holder, and the holder in that case, as in this, was the purchaser of the note. The court, having ascertained that the person in favor of whom the judgment was confessed was a person for whom the attorney could not, under the terms of the power, confess judgment, did not hesitate to declare the judgment void for want of jurisdiction.

And so in this case, the court having determed that the plaintiff in the Ohio suit was not a person in whose favor Wiley authorized the attorney to confess judgment against him, did not hesitate to declare the Ohio court without jurisdiction and the judgment void. For this holding the Nebraska court had the high authority of the Ohio court, as well as the plain meaning of the terms of the power itself.

The views of the Ohio courts, in construing warrants of attorney or powers to confess judgment, conform to the decisions of all the states. There is an unbroken uniformity of decisions strictly construing powers of this kind.

Cahn v. Lessor, 72 N. W., 739, (Wis. Oct. 1897)
Morris v. Bank, 67 Texas, 602.
Bank v. St. John's, 5 Hill, 497.

(*c*) Looking now at this warrant of attorney just as it is, and construing it in the light of established rules of strict construction applicable to such instruments, we clearly see that the attorney was not Wiley's attorney except as between Wiley and the holder of the note. Hence, if the plaintiff was not the holder of the note, the attorney was not Wiley's agent and could not give the court jurisdiction over him.

The question, therefore, as to whether or not the plaintiff was the holder of the note was open to inquiry in this suit, because it was a necessary prerequisite, a condition precedent, to the Ohio courts jurisdiction that the plaintiff in the case should be the holder of the note. This was an essential element in the facts constituting jurisdiction. And if that element was wanting then so was jurisdiction wanting.

Suppose, for instance, some one other than John Bender or an attorney at law, a butcher if you please, had assumed to confess judgment against Wiley on this note, would not that question have been open to collateral inquiry in a suit against Wiley on the judgment so confessed? Would it not have been open to Wiley to say that the court had no jurisdiction over him because this person assuming to confess judgment against him was neither John Bender nor an attorney at law, and therefore not of his appointment, not his agent, nor authorized to act for him?

But a particular agent or a person belonging to a class any one of whom may act as agent, is not an agent except to do the very thing for the very person designated in the letter of his appointment. Suppose A appoint B to sign A's name to a promissory note payable to the order of C, and in place of doing so B signs A's name to a promissory note payable to the order of D, will the note be A's note? Can D collect it of A? Will it not be open to A to say B was not his agent? Will B not be guilty of a forgery?

Confusion must not be allowed to come into this case because the agent appointed was one of a class and the person in whose behalf he was authorized to act was not designated by a specific name but was designated by the word "holder." The word "holder" is as specific and well defined in respect of negotiable

paper as is a proper name in respect of the designation of a particular person. The holder of the note is " the owner thereof, one who in good faith acquired the same for a valuable consideration ".

Randolph on Com. Paper, Vol. 1, Sec. 14 and note.

Now suppose Wiley, in place of authorizing the attorney to confess judgment against him in favor of the holder, had authorized him to confess judgment against him in favor of John Smith, and under that authority the attorney had assumed to confess judgment against him in favor of the National Exchange Bank, would the attorney have been Wiley's agent? Would the Court have had jurisdiction over Wiley? Would it not have been open to Wiley collaterally to assert and maintain in an action on such a judgment that he was not in court; that he had appointed an attorney to confess judgment against him in favor of John Smith, but never appointed an attorney to confess judgment against him in favor of National Exchange Bank? Or must he now remain silent, is his mouth forever closed to assert the truth, because some one whom he never appointed to act as between him and National Exchange Bank has assumed to act for him and induced a court to spread on its records the form of a judgment against him? Are persons and property conclusively bound because judgment forms are spread on court records? If so, then I can imagine no devise so convenient and powerful as the Courts of Justice for the successful perpetration of imposition and fraud.

The limitation of the agent's authority to confess judgment against Wiley in favor of the holder of this note was not made without a purpose. It cannot be assumed that the makers of this note intended to give

currency to an instrument that if the plaintiff's claim here is true might well work their financial ruin. It must be assumed that when they said holder they meant holder. If they did not, if they meant that any one not the holder might get any attorney at law to confess judgment against them on the note, then might this instrument be used as the basis of as many judgments against them as there were dishonest persons to be found to take the note and have judgments forms entered against them in the courts. Why, sirs, if this is the case, and the effect of judgment so entered is what the plaintiff claims it is, then with such an instrument, by successive judgments, the richest man to be found anywhere could be financially ruined by obtaining his name to a note like this. The amount that could by it be filched from him through the power of the Courts, would, like the value of money, merely depend upon the rapidity of the note's circulation through the courts.

No, when the makers of this note said holder they meant holder. They meant to appoint an agent to confess judgment in favor of a specific person. If he acted for someone who was not the holder he was not their agent, any more than that B, who had authority to sign A's name to a note payable to C, was not A's agent to sign his name to a note payable to D, or than that an agent authorized to confess judgment in favor of John Smith was not an agent to confess judgment in favor of National Exchange Bank.

(d) But the plaintiff, compelled by the jury's verdict to admit that it was not the holder of this note and therefore that the attorney was not of Wiley's appointment and not his agent, nevertheless insists that, although the Court did not have jurisdiction over Wiley, he cannot now say so; that this person who was not

his agent and had no power to act for him could so act anyhow as that Wiley cannot now question the jurisdiction of the court.

I am not quite sure I clearly grasp the plaintiff's position here. I understand the plaintiff to admit that the jurisdiction of the Ohio Court may be collaterally attacked. In its brief, the plaintiff quotes as good law that part of the court's opinion in *Teel v. Yost, 128 N. Y.*, 387, where it is said that "the defendant may disprove the authority of such attorney to appear for him." The plaintiff refers to *Simmons v. Saul, 138 U. S.*, 439, where the court declared "it is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each state to the judicial proceedings of other states, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter of the parties affected by it, nor into the facts necessary to give such jurisdiction," as "decisive of the case at bar." And yet the plaintiff seems to claim that Wiley could not "disprove the authority of such attorney to appear for him," nor go into the facts necessary to give the Ohio court jurisdiction.

I imagine one ground of our disagreement here arises from our different understandings of the meaning and importance of the word holder in this warrant of attorney, and of the scope of the Ohio judgment as an adjudication.

The plaintiff claims, on the one hand, it was necessarily adjudicated as a fact in the Ohio case that the plaintiff there was the holder of the note, and that therefore that question is not now open to inquiry in this suit.

The defendant claims, on the other hand, that "holder" in respect of this note had a two-fold mean-

ing and importance: first, was the plaintiff the holder of the note for the purpose of ascertaining whether the attorney was Wiley's agent to the end that the agent could give the court jurisdiction over Wiley—that is, did this essential fact exist necessary to give the court jurisdiction; second, was the plaintiff the holder of the note to the end that, after the court acquired jurisdiction of the parties, it would render judgment for the plaintiff? It is the first of these two meanings of the word holder as it bears upon this case that we are concerned with here, not the second. If the plaintiff was the holder of the note and therefore the attorney Wiley's agent, then the court acquired jurisdiction of the parties, and what it did after it got jurisdiction Wiley could not now question. But if the plaintiff was not the holder of the note, and, therefore, the attorney not Wiley's agent, then the court did not have jurisdiction of the parties, and Wiley may now question all that it did.

Nor could the court by anything it did conclude Wiley from questioning this fact in that sense in which its existence was essential to the court's jurisdiction over him. The Court could not by its own finding give itself jurisdiction, or prevent Wiley from denying that it had jurisdiction. As Mr. Justice Bradley said in *Thompson v. Whitman*, "The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

Until the court got jurisdiction it had no power to act. To say that because the court must have found the plaintiff was holder of the note in the sense that

the existence of that fact was necessary to give the court jurisdiction, begs the whole question here.

Suppose the jurisdiction of the Ohio Court, in place of depending upon the fact that the plaintiff in the suit was the holder of the note, were based upon due and personal service of summons, the record containing a recital that the Sheriff of Seneca County had personally served Wiley with summons within that county,—would Wiley be concluded by the record and judgment if the recital of the service of summons essential to the court's jurisdiction was false?

Thompson v. Whitman and all the federal cases hold that he would not. Why not? Why, because if the Sheriff's return was false, then the court, as matter of fact, not having jurisdiction over him, would not have jurisdiction to make the very recital Wiley was now drawing in question. That the court seemed to have jurisdiction and recited that it had acquired jurisdiction, could have no conclusive binding force on Wiley because he was not in court. And so it is with the question as to whether or not the plaintiff was the holder of this note. That was a fact necessary to give jurisdiction.

"The facts necessary to give such jurisdiction may always be questioned."

Thompson v. Whitman, 18 Wall, 457.
Knowles v. Gas Light Co., 19 Wall., 58.
Hall v. Lanning, 91 U. S., 160.
Penoyer v. Neff, 95 U. S., 714.
Cole v. Cunningham, 133 U. S., 107.
Simmons v. Saul, 138 U. S., 439.
Thormann v. Frame, 176 U. S., 356.
Bell v. Bell, 181 U. S., 175.

Therefore, the question as to whether the plaintiff was holder of the note was open to question. It lay

at the threshold of the court's jurisdiction. It was a fact necessary to give jurisdiction.

(e) Again. The plaintiff insists at page 22 of its brief that "Whether or not the plaintiff was the holder of the note is not a jurisdictional question, but is instead a quasi-jurisdictional question, and the judgment of the Ohio court is conclusive thereon," and cites a number of cases claimed to be authority for this proposition.

I am satisfied the plaintiff and myself do not agree about what the distinction is between a strictly jurisdictional question and a quasi-jurisdictional question. Nor do I believe I clearly enough understand the plaintiff's views on this distinction fairly to state them here.

I claim that any fact essential to the jurisdiction of the court over the subject matter of the action, or over the parties to the suit, is strictly a jurisdictional question; that any fact not essential to the jurisdiction of the court over the subject matter of the action, or over the parties to the suit, but merely going to some preliminary fact necessary to be proven to authorize the court to act, such as diverse citizenship or the amount in dispute in the federal courts, are quasi-jurisdictional facts. In other words, all facts essential to the court's jurisdiction over the person or the thing are strictly jurisdictional; but the court, having acquired jurisdiction over the person or the thing, then has jurisdiction to pass on all other jurisdictional questions, because they are not strictly jurisdictional, they are only quasi-jurisdictional.

Let me illustrate my understanding of this distinction by some adjudicated cases containing examples of strictly juristictional and of quasi-jurisdictional facts.

The following cases, on the one hand, involved strictly jurisdictional questions,—

Penoyer v. Neff, 95 U. S., 714, as to whether or not service of process within the state was essential to the validity of a personal judgment.

Griffith v. Frasier, 8 Cranch., 9, as to the validity of the appointment of an administrator of the estate of a living person.

Wise v. Whithers, 3 Cranch.s 331, as to the validity of a sentence by a court martial against a person not in the military service.

Rose v. Himley, 4 Cranch., 214, as to the validity of a judgment in proceedings *in rem* where the *res* was not seized within the balliwick.

Galbin v. Pays, 18 Wall., 350, as to the validity of a decree charging the property of an absent defendant where publication has not been made in strict accordance with the statute.

Clark v. Clark, 178 U. S., 186, as to the validity of title claimed under the inheritance laws of one state to lands lying in another state.

The questions in all the foregoing cases involved the jnrisdiction of the court over the person or over the thing. Hence, they were all strictly jurisdictional questions.

Examples of quasi-jurisdictional questions on the other hand, questions, namely, constituting merely preliminary facts necessary to be proven, not for the purpose of giving the court authority to bind the person or the thing, but to set the machinery of the law in motion and authorize the court to act after jurisdiction of the person or of the thing has been acquired, are the following,—

Averments of diverse citizenship necessary to give the Federal courts jurisdiction.

Des Moines v. Iowa, 123 U. S., 552.

The existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy.

Mickle v. Post, 21 Wall., 398.

The fact that there is sufficient personal property to pay the debts of a decedent when application is made to sell his real estate.

Comstock v. Crawford, 3 Wall., 396.

The fact that one of the heirs of an estate had reached his majority when the act provided that the estate should not be sold if all the heirs were minors.

Thompson v. Tolme, 2 Peters, 157.

The question as to whether or not a contract gave certain trustees the powers the court found it gave them.

Reinach v. Atlantic, &c., R. Co., 43 Fed., 83.

The question as to whether or not the courts of another state were right in discharging a contract there made.

Betts v. Bagley, 12 Pick., 572.

The question as to whether or not the domicile of a decedent was within the state so as to authorize the issuance of letters of administration, the property itself being within the state.

Holcomb v. Phelps, 16 Conn., 132.

When the parties are in court and the jurisdiction depends on a fact litigated in the suit, and is adjudged in favor of that party who avers the jurisdiction.

Wright v. Douglas, 10 Barb., 97.

Simmons v. Saul, 138 U. S., 439, which the plaintiff declares "is decisive of the case at bar," is a good illustration of the distinction between strictly

jurisdictional and quasi-jurisdictional questions. In that case, the property in question as well as the domicile of the decedent was within the jurisdiction of the court. The court had jurisdiction over the thing. Thereupon, having acquired jurisdiction over the thing, its subsequent acts in disposing of it were at most quasi-jurisdictional. And such was the ground of the court's decision. Mr. Justice LAMAR for this court said:

"The jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court cannot oust that jurisdiction. They are at most errors which could be corrected on appeal, or avoided in a direct action of annullment as expressly provided in the articles of the Code cited above, but cannot be made the ground on which the decree of the court can be collaterally assailed."

But these quasi-jurisdictional questions bear no resemblance to the question involved in this suit. The question involved here is, Did the court have jurisdiction over Wiley? Was Wiley ever in court? Did the facts exist essential to the court's jurisdiction over the person? This, therefore, was not a quasi-jurisdictional, but a strictly jurisdictional, question.

Hence, in conclusion on this point, this case, like all other cases, is one where the facts necessary to give the court jurisdiction over the person may always be questioned. Neither the record, nor presumptions from the record, can conclude inquiry into the question of jurisdiction.

The plaintiff went into court with a warrant of attorney authorizing any attorney at law to confess judg-

ment against Wiley in favor of the holder of the note, and no one else.

This warrant of attorney is one of a class of instruments having an unfavorable standing before the courts. The powers it confers are strictly construed. The special authority it gives must be strictly pursued.

Looking then at the warrant of attorney just as it is, construing it according to the rules of strict construction applicable to such instruments, the attorney was Wiley's agent as between Wiley and the holder of the note only. If the plaintiff was not the holder of the note, the attorney was no more Wiley's agent than was B who was A's agent to sign A's name to a note to C, for that reason A's agent to sign A's name to a note to D; nor than an agent authorized to confess judgment in favor of John Smith was on that account an agent to confess judgment in favor of National Exchange Bank.

Nor is Wiley concluded by the judgment of the Ohio court. The fact he here contests is a fact necessary to give the Ohio court jurisdiction over the person. Therefore it is a strictly jurisdictional fact which may always be questioned.

This strictly jurisdictional fact, thus fairly in issue and fairly submitted to the jury, was on an overwhelming weight of evidence found against the plaintiff. Hence, the judgment here is right, for on this note Wiley has not had his day in court.

IV.

Even if the court erred in its instructions to the jury as claimed, the error was without prejudice; for if the plaintiff's judgment was valid, it was a joint judgment against Wiley and Wiley Construction Company. Hence the plaintiff could not maintain this suit against Wiley alone.

1. The sixth paragraph of the defendant's answer is as follows:

"This defendant further says, upon information and belief, that whatever judgment, if any, purports to have been rendered in Seneca County, Ohio, upon said note, was not against them severally, nor against them one as principal and the other as indorser or surety.

"Wherefore the said plaintiff ought not now to be permitted to maintain this suit."

When the plaintiff offered the transcript of its judgment in evidence (Ex. 1) the defendant made the following objection (p. 20): "The defendant objects to the introduction of Exhibit 1 because Exhibit 1 is not responsive to the pleadings. The petition alleges a judgment against Wiley. Exhibit 1 purports to show a joint judgment against the Wiley Construction Company and S. L. Wiley. Such a judgment cannot be made the basis of a separate action against one of the named debtors."

Therefore, the point now made was clearly brought before the trial court, and in spite of it the plaintiff elected to proceed with its case against Wiley alone, as originally brought.

2. If the transcript from the Ohio court shows a judgment at all, it is a joint judgment against Wiley Construction Company and S. L. Wiley.

The petition in the Ohio Court (p. 81) was against Wiley Construction Company and S. L. Wiley. It charged that "the defendants" executed and delivered to the plaintiff the note in question with the warrant of attorney annexed.

"Wherefore plaintiff prays judgment against said defendants," &c.

The answer in the Ohio Court (p. 83) purported to "enter an appearance for said defendants," and "confess judgment in favor of said plaintiff against said defendants." The findings of the Court (p. 83) referred to the petition and the answer of said defendants. Wherefore it was "considered that said plaintiff recover of said defendants the sum of $11,419.68," and costs.

In the entire proceeding, therefore, in the Ohio court, Wiley Construction Company and S. L. Wiley were referred to by the same word, as "defendants." They were treated together and precisely alike. The judgment purports to be, and if it is a judgment at all it is, a judgment against both of them jointly.

3. A joint judgment cannot be made the basis of a separate suit against one of the judgment debtors.

First National Bank v. Hamor, 63 Fed., 36.
Watson v. Steineu, 33 A., 4 (R. I. 1895).
Knapp v. Abell, 10 Allen, 485.
Mann v. Edward, 138 Ill., 19.
Smith v. Smith, 17 Ill., 481.
Donnelly v. Graham, 77 Pa. St., 274.
Holbrook v. Murray, 5 Wend., 161.
Dark v. Goss, 24 Mich., 265.
Sheehan v. Sims, 28 Mo. Ap., 64.
Lawrence v. Willoughby, 1 Minn., 65.

One reason for the rule that all judgment debtors must be made defendants to a suit on a joint judgment is, that a defense available to one of them constitutes

also a complete defense for all. Suppose, for instance, the Wiley Construction Company had been made a party defendant to this suit, and had pleaded and proved that the Ohio Court had no jurisdiction over it, or that it had paid the plaintiff's judgment, or that it had obtained a release from liability, or that for any other reason the plaintiff could not recover against it on this judgment; then the judgment being joint, the defense maintained by Wiley Construction Company would have been available as a defense to Wiley. The Wiley Construction Company may have some defense to this judgment that Wiley has not, or does not know about. If so, Wiley is entitled to the benefit of that defense.

This rule that all judgment debtors must be made defendants to a suit on a joint judgment, and the reasons for the rule, are clearly stated by JUDGE HANFORD in a case precisely like this, as follows:

"The complaint alleges judgments recovered against the defendant alone in actions wherein the plaintiff and the defendant, George D. Hamor, were the plaintiff and defendant. The transcripts show judgments in favor of the plaintiff and against both defendants in three actions in which the plaintiff was plaintiff and George D. Hamor and one E. Kuntz were defendants. The judgments appear to have been entered by the prothonotary upon promissory notes made by one H. Loeb to Hamor and Kuntz, and which notes were, by indorsements thereon, assigned by George D. Hamor and E. Kuntz to the plaintiff, and by the same endorsements the assignors jointly guaranteed the payment at maturity, and empowered any attorney of any court of record to confess judgment against them for the sums named in the notes, with 5 per cent. attorney's fees. The contracts of assignment, guarantees of pay-

ment, and warrants to confess judgment, created as to each of the notes a joint liability; and the judgments entered thereon are against the defendant and E. Kuntz, and do not in anyway change the position of the parties, or create any several or new liability. The record in this case and the evidence fails to disclose that Kuntz has died, if such be the fact, or that there is any reason for not joining him as a party defendant. If he has paid the debt, or been released, or has any valid defense, the same should be as available to the defendant as it would be to him. For this reason the variance between the allegations of the complaint descriptive of the judgments sued upon and the proofs introduced cannot be deemed immaterial or unimportant. City of Detroit v. Houghton, 42 Mich. 459, 4 N. W. Rep., 171, 287; Mace v. Page, 33 Mich. 38; Cunningham v. Hobard, 7 Gray, 423; Dibrell v. Miller, 29 Amer. Dec. 126. There is a total failure to prove the existence of the judgments described, and it would be unjust for the plaintiff to recover upon proof of other and different judgments, not mentioned in the complaint, especially as there could be no recovery against this defendant alone in an action with proper pleading conforming to the proofs."

First Nat. Bank v. Hamor, 47 Fed., 36.

And so, in this case, "there is a total failure to prove the existence of the judgment described" in the plaintiff's petition. The plaintiff averred that it had recovered a judgment against Wiley. It has exhibited no evidence of a judgment against Wiley. All the evidence it produced was of a joint judgment against Wiley and Wiley Construction Company.

In *Watson v. Steinau*, 33 A. 4 (R. I., 1895) the only point stated in the syllabus was as follows:

"A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot, in Rhode Island, be enforced against one of such defendants who in the foreign action was served with process."

And in the body of the opinion the Court stated its conclusion as follows:

"The rule which is established by the preponderance of authority is, that the plaintiff who sues on a judgment must recover against all of the defendants or none; for, the judgment being an entirety, whatever constitutes a good defense for one of the defendants operates also for the benefit of the others. Hall v. Williams, 6 Pick, 232; Oakley v. Aspinwall, 4 N. Y., 514; Richards v. Walton, 12 Johns, 434; Holbrook v. Murray, 5 Wend., 161; Rangeley v. Webster, 11 N. H., 299; Knapp v. Abell, 10 Allen, 485; Buffum v. Ramsdell, 55 Me., 252; Hulme v. Janes, 6 Tex., 242; Brockman v. McDonald, 16 Ill., 112; Williams v. Chalfant, 82 Ill., 218; Winslow v. Lambard, 57 Me., 356; Burt v. Stevens, 22 N. H., 229; Donnelly v. Graham, 77 Pa. St., 274; St. Louis v. Gleason, 15 Mo. Ap., 25; Wright v. Andrews, 130 Mass., 149; Pratt v. Dow, 56 Me., 88."

Whether, therefore, there was an error on the trial of this case or not, there is no evidence to support the plaintiff's claim, and so the plaintiff has not been prejudiced.

Respectfully submitted,

JAMES H. MCINTOSH,
Attorney for Defendant.

3 March, 1904.

Supreme Court of the United States.

No. 53.—October Term, 1904.

National Exchange Bank of Tiffin, Ohio, Plaintiff in Error, vs. Solon L. Wiley. } In error to the Supreme Court of the State of Nebraska.

[November 28th 1904.]

Mr. Justice Harlan delivered the opinion of the Court.

This is an action upon a judgment rendered in one of the courts of Ohio, and the question to be considered is whether the final judgment under review gave to the proceedings in the Ohio court such faith and credit as are required by the Constitution and laws of the United States.

The Constitution, Art. IV, § 1, provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The statute enacted in execution of that power, *R. S.* § 905, provides for the authentication of the records and judicial proceedings of the several States and Territories and any country subject to the jurisdiction of the United States, and declares that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

The Wiley Construction Company, a Massachusetts corporation, and Wiley, the defendant in error, executed and delivered to the National Exchange Bank, the plaintiff in error, a written instrument—being a note with warrant of attorney annexed—dated Tiffin, Ohio, April 26th 1884, in which for value received they jointly and severally promised to pay to that bank, or order, on the 1st day of October 1884, at its office in that city, ten thousand dollars with eight per cent interest after maturity. The instrument authorized N. L. Brewer, or any attorney at law in the United States, or elsewhere, to appear before any court of record, after such obligation became due, waive the issuing and service of process, and confess judgment against the obligors or either of them "in favor of the *holder*" for the amount then appearing to be due, together with the cost of suit; and thereupon to release all errors and writs of errors, and in

behalf of the obligors or either of them waive all right to appeal and stay of execution.

On the 31st day of July 1899, nearly fifteen years after the maturity of the note, the National Exchange Bank instituted suit against both obligors in the court of Common Pleas of Seneca County, Ohio—a court of general jurisdiction in that State—to recover the balance due on that obligation, which was alleged to be $5,772.70, with interest from May 9th 1887 at eight per cent. Upon it was credited a payment of $6,311.75 as of May 9th 1887.

It may be here stated that there was no endorsement on the note showing that it had ever been assigned or transferred by the original payee.

With the petition in that suit were filed copies of the paper constituting the note and warrant of attorney. With it was also filed an answer, in which an attorney, assuming, by virtue of the above warrant and not otherwise, to be the attorney of the Construction Company and of Wiley, confessed judgment against them for the full amount claimed by the Bank.

On the very day of the bringing of that suit judgment was entered against the defendants therein for $11,419.68, being the amount of the obligation with interest at eight per cent from May 9th 1887—the judgment reciting that the attorney who acted under the warrant of attorney, naming him in person, by virtue of that warrant, entered the appearance of the defendants, waived the issuing and service of process, confessed judgment, and released and waived all exceptions, errors and right of appeal.

The present action was by the National Exchange Bank against Wiley on the judgment rendered in the Ohio suit. The defendant disputed the plaintiff's right to recover upon several grounds, one of which was that prior to the institution of the Ohio suit and more than twelve years before the commencement of the present action, the note had been fully discharged, so far as he was concerned, pursuant to an agreement between him and the holder. But on this writ of error we are concerned only with the part of the defense which distinctly raises a Federal question.

The defendant alleged that the warrant of attorney annexed to the note of April 26th 1884 did not authorize a confession of judgment against the obligors except in favor of the "holder;" that so far from the National Exchange Bank being such holder when it brought the Ohio suit, the Tiffin National Bank, as early as March 2d 1885, purchased, received and became the holder of the obligation, and thereafter remained and still was the holder; that, therefore, the attorney professing to act in behalf of the defendants in the Ohio suit had no authority, in virtue of such warrant of attorney, to represent them in that suit, or to confess judgment in favor of the National Exchange Bank; that the defendant was neither served with process in the Ohio suit nor had any notice thereof; that the Ohio

court was entirely without authority or jurisdiction to render judgment against him in favor of the plaintiff Bank; and that its authority or jurisdiction could not be upheld consistently with the Fourteenth Amendment of the Constitution of the United States.

The plaintiff insisted that it was the holder of the note when put in suit; further, that the court in Ohio had full power and jurisdiction to render the judgment in question, and that neither personal service of process on nor notice to the obligors was necessary in order to give that court jurisdiction of the parties and subject-matter.

Both at the trial and in the Supreme Court of Nebraska the Bank contended that full faith and credit, as required by the Constitution and laws of the United States, would not be given to the proceedings in the Ohio suit if the judgment in its favor was held not to be conclusive in respect of the authority of the Ohio court to render such judgment.

It is unnecessary to set out all the instructions. It is sufficient to say that the jury were, in substance, instructed that the warrant of attorney authorized a confession of judgment in favor of the holder of the note; that it was to be presumed upon the showing made by the record of the Ohio court that it had jurisdiction to render the judgment sued on; and that such presumption continued throughout this case, unless the defendant, by a preponderance of evidence, proved that the plaintiff bank was not, in fact, the holder of the note when put in suit in Ohio. The jury were also instructed that if the plaintiff was found not to be such holder, the verdict should be for the defendant.

The jury's verdict was for the defendant and the judgment thereon was affirmed. Upon the issue as to the ownership of the note at the time it was sued on in Ohio there was, as the Supreme Court of Nebraska held, proof both ways.

Did the Ohio court have jurisdiction to render the judgment in question? It is a settled doctrine, Chief Justice Marshall said in *Rose* v. *Himely*, 4 *Cr.* 269, that the effect of every judgment must depend upon the power of the court to render that judgment. In determining whether the Ohio court had authority to render the judgment against the obligors in the note, we must look first into the decisions of the highest court of that State.

In *Osborn* v. *Hawley*, 19 *Ohio*, 54, 130, (1850) the plaintiff declared as endorsee of a promissory note, to which was attached a power of attorney to confess judgment. The report of that case is very meager, but in the course of the opinion the court said: "The power of attorney is not negotiable, and when the legal title to the note is transferred the power of attorney becomes invalid, and no power whatever can be exercised under it, for the benefit of the endorsee; and he holds the note as if no such power had ever been attached to it."

In *Marsden* v. *Soper*, 11 *Ohio St.* 503, (1860) the plaintiff declared on a note to which was attached a warrant of attorney authorizing a confession of judgment "in favor of any holder." A suit was brought on the note in one of the courts of Ohio by the endorsee thereof, and judgment was confessed under a warrant of attorney annexed to the note. The question was whether the court had jurisdiction of the persons of the defendants so as to authorize a judgment affecting their rights. The Supreme Court of Ohio said: "It will be noticed that the plaintiff in this judgment is not the payee of the note on which judgment is taken, but an endorsee; and that the warrant of attorney under which judgment was confessed purports to authorize such confession 'in favor of any holder of this obligation,' after the same becomes due. But, it was held, in broad and general terms, in the case of *Osborn* v. *Hawley*, 19 *Ohio Rep.* 130, that a warrant of attorney to confess judgment, attached to a note, and forming a part of the same instrument, is not negotiable, and when the note is transferred becomes invalid and inoperative. It is true, the report of that case does not inform us whether the warrant of attorney in that case purported to authorize the confession of a judgment in favor of the payee of the note alone, or whether its terms extended, as in this case, to any holder of the note after due. But, however this may have been in that case, we suppose that, if this judgment rested upon the confession under the warrant of attorney alone, it would be very questionable whether the Court of Common Pleas had any rightful jurisdiction of the defendants in the judgment."

In *Cushman* v. *Welsh*, 19 *Ohio St.* 536, 539, the warrant of attorney authorized a confession of judgment "in favor of the legal holder." The note there in question was payable to order and had not been regularly endorsed to the party who in fact purchased and owned it and in whose name suit was brought. The question in the case was whether the confession under the warrant of attorney authorized judgment in favor of the purchaser. The court said: "Though he might, as the owner of the note in equity, have brought action thereon, under the provisions of the code, in his own name, against the makers of the note, it does not follow that he could obtain judgment by confession on their warrant of attorney attached to the note. That depends on the extent of the power conferred by the warrant. The attorney can do nothing more than execute the power conferred by his warrant; moreover, 'authorities of this sort must be strictly pursued.' *Cowie* v. *Allaway*, 8 *Durnf. & East*, 257. 'Indeed, formal instruments of this sort are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.' *Story on Agency, sec.* 68. Now, the power conferred by the terms of the instrument in this case was, to confess judgment only 'in

favor of the *legal* holder' of the note. The plaintiff below was not the 'legal' holder of the note, for the note had not been endorsed to him. He could become the 'legal holder' of the note only 'by endorsement thereon,' as authorized by the statute. *S. & C. Stat.* 862; *Avery* v. *Lattimer*, 14 *Ohio*, 542. The waiving of the process and confession of judgment in favor of the plaintiff below was not, then, within the authority conferred by the power of attorney. Under the rule of interpretation applicable to such instruments, we must conclude that the jurisdiction of the defendants below, obtained through the warrant of attorney only, and the confession of judgment by means thereof, exceeded the authority conferred by the defendants in their power of attorney, and that the court, therefore, erred in overruling their motion to set aside the judgment, irregularly obtained against them."

In *Watson* v. *Paine*, 25 *Ohio St.* 340, which was an action upon a judgment based on a warrant of attorney attached to a promissory note, and which authorized any attorney at law to confess judgment in favor of the holder of the note, the point was made that the warrant of attorney did not authorize the waiving of process or an appearance for the defendants in an action brought by an endorsee. The members of the Supreme Court of Ohio were divided in opinion on that point, and it was left undecided. The case went off upon another ground, but McIvaine, J., delivering the judgment of the court, expressed his individual opinion that a power to confess judgment in favor of any holder of the note may be exerted as well in favor of an endorsee as of the payee.

But in *Clements* v. *Hull*, 35 *Ohio St.* 141–3, it was held that, under the Code of Civil Procedure, a warrant of attorney authorizing judgment to be confessed in favor of the holder of a note could be executed in favor of the equitable owner and holder, being the real party in interest. The court said: "The scope of the power is not limited in this case as it was in the case of *Cushman* v. *Welsh*, 19 *Ohio St.* 536, in favor of the 'legal holder' only. The authority here given is 'to confess judgment in favor of the holder of said note,' and we think these words were intended, and should be construed, to embrace any holder who might lawfully prosecute an action on said note, in his own name and for his own use."

The latest case in the Supreme Court of Ohio is *Spence* v. *Emerine*, 46 *Ohio St.* 433, 440–1. There the note was payable to a named person or bearer, and the warrant of attorney authorized any attorney to appear for the obligor in any court of record in Ohio, and confess judgment for the amount then due, and to release all errors and the right of appeal. The confession was in favor of one to whom the note had been transferred by delivery merely. The question was as to the power of the court to render the judgment. The Supreme Court of Ohio, after referring to its prior

adjudications, said: "Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But it is an established principle that an authority given by warrant of attorney to confess a judgment against the maker of the note must be clear and explicit and strictly pursued, and we cannot supply any supposed omissions of the parties. *Cushman* v. *Welsh*, 19 *Ohio St.* 536; *Cowie* v. *Allaway*, 8 *T. R.* 257; *Henshall* v. *Matthew*, 1 *Dowling's Pr. Cas.* 217; *Foster* v. *Claggett*, 6 *Dowling's Pr. Cas.* 524; *The Manufacturers' & Mechanics' Bank of Philadelphia* v. *St. John*, 5 *Hill*, 497. . . The power of attorney attached to the note in controversy does not, in express language, authorize a confession of judgment in favor of any one, not even of the payee; but if such authority might be implied as to the payee, we cannot, under the rule of a strict interpretation, extend that implication in favor of the defendant in error to whom the note was transferred by delivery. . . It will thus be seen that where it has been adjudged by the court that a power of attorney to confess a judgment may be executed in favor of a party other than the payee, it has been in cases where authority was expressly conferred to confess a judgment in favor of a *legal holder* or *holder* of the note. The decisions have all been based upon a strict interpretation of the power granted, without aiding any omission or defect in its terms by liberal intendment or construction. In accordance with the views which we have expressed, our conclusion is, that the warrant of attorney attached to the note sued on did not authorize a confession of judgment in favor of defendant in error, and, there having been no summons or other notice to the plaintiff in error of the bringing of the original action, the Court of Common Pleas acquired no jurisdiction over the person of the plaintiff in error, and erred in rendering a judgment against him."

Looking at the face of the note, the National Exchange Bank insists that, being payee, it was also the holder within the meaning of the warrant of attorney, however strictly construed; that nothing else appearing than the note and warrant a confession of judgment in its favor was in conformity with law and usage in Ohio, as declared by the highest court of that State. We incline to think that that position is justified by the above cases, when carefully considered; and assuming, such to be the law as administered in Ohio—which is the view most favorable to the plaintiff in error—the question still remains whether the judgment, when sued on in another State, may be collaterally attacked upon the ground that the party in whose behalf it was rendered was not in fact the holder, because not the real owner of the note? This question must, we think, be answered in the affirmative. It can be so answered without doing violence to the Constitution or the laws of the United States. While the words of the

warrant of attorney might be held to embrace any holder, even the equitable owner, who might rightfully prosecute an action on the note in his own name and for his own use (*Clements* v. *Hull*, 35 *Ohio Stat.* 141, above cited,) yet if it was true, as alleged, that in 1885 the Tiffin National Bank purchased, received and became the owner of the note, then the National Exchange Bank could not thereafter rightfully sue on it in its name and for its own use. Here, the confession of judgment was in behalf of the payee bank, which was not entitled to sue for its own use or to receive the proceeds, if it sold the note in 1885, and never afterwards became the owner The words, in the warrant of attorney, "in favor of the holder of this instrument," ought not, as between the National Exchange Bank and the obligors, to be construed as embracing the former after it ceased to be the owner of the note, but, at most, as only authorizing a confession of judgment in favor of the party who had become its real owner. It should not be supposed that the obligors intended, or that the payee bank ever understood them as intending, to authorize a confession of judgment in favor of one who was not entitled, of right, to demand payment from the obligors. That view accords with justice, and, not being inconsistent with the words in the warrant of attorney, it should be adopted.

Byles on Bills says that "*holder* is a general word, applied to any one in actual or constructive possession of the bill, and entitled at law to recover or receive its contents from the parties to it." *Sharswood's Ed.* 66. So in 1 Parsons Bills and Notes it is said that "by the holder of negotiable paper is meant, in law, the owner of it; for if it be in his possession without title or interest he is, in general, considered only as the agent of the owner." *p.* 253. So that proof that the payee bank was not the owner of the note when it brought suit in Ohio tended to show that it was not in law the "holder" of the instrument within what must be regarded as the true meaning of the warrant of attorney, and, therefore, that the court was without authority to enter judgment by confession in its favor against the obligor. In other words, the defendant Wiley could show collaterally that he was not legally before the court—as he was not in any just sense—if his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and, consequently, that the court was without jurisdiction to proceed except on legal notice to him or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then, such law and usage would be in conflict with the Constitution of the United States; for, it is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law.

This whole subject was carefully considered in *Thompson* v. *Whitman*, 18 *Wall.* 457, 463, 469. That was an action of trespass, brought in the Circuit Court of the United States for the Southern District of New York, for taking and carrying away a certain sloop. The defendant, a New Jersey sheriff, had seized the vessel, pursuant, as he claimed, to a statute of New Jersey relating to the raking of clams, and proceeded against it before two justices of Monmouth County, New Jersey, by whom it was condemned and ordered to be sold. Those justices had no jurisdiction, under the statute, to act in the premises, unless the seizure and the offense *both* occurred in that county. The record of the case recited that the offense was committed *and the seizure* made in Monmouth County, and the contention was that the record was conclusive, both as to the jurisdiction of the court and the merits of the case. In that case it was held to be competent for the complaining party to prove collaterally that the vessel was not seized in Monmouth County, and, therefore, that the facts necessary to the exercise of jurisdiction by the New Jersey justices did not exist, although their existence was recited or affirmed in the official record made by them. Speaking by Mr. Justice Bradley, this court adjudged, in the language of Story, that the Constitution "did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them, as evidence;" and, upon an elaborate review of previous cases, that "the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and law of 1790 [*R. S.* § 905 *et seq.*], and notwithstanding the averments in the record in the judgment itself." There has been no departure in the decisions of this court from the doctrines announced in *Thompson* v. *Whitman*, whether the question related to courts of general or to courts of limited or special jurisdiction. It has been repeatedly affirmed. *Knowles* v. *Gas Light Co.*, 19 *Wall.* 58, 61; *Hall* v. *Lanning*, 91 *U. S.* 160, 165; *Pennoyer* v. *Neff*, 95 *U. S.* 714, 732; *Cole* v. *Cunningham*, 133 *U. S.* 107, 112; *Grover & Baker Machine Co.* v. *Radcliffe*, 137 *U. S.* 287, 295; *Thorman* v. *Frame*, 176 *U. S.* 350, 356; *Bell* v. *Bell*, 181 *U. S.* 175, 178; *Andrews* v. *Andrews*, 188 *U. S.* 14, 34. The general jurisdiction of the Ohio court undoubtedly embraced such a cause of action as was set forth in the suit on the note. But we are of opinion that that court had no authority or jurisdiction to render judgment against the obligors, if the National Exchange Bank had in fact sold the note and ceased before the commencement of that suit to own it or to be entitled to receive the proceeds to its own use. It was, in such case, in legal effect, a personal judgment without service of process upon the defendants and without their appearance in person or by an authorized attorney. The

proceedings were wanting in due process of law. The obligors never consented to judgment by confession in favor of one who was not the owner of the note or entitled to receive its proceeds, and the warrant of attorney cannot be held to have authorized such a confession.

Perceiving no error of law in the record the judgment must be affirmed.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.